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In the Supreme Court of the United States

OCTOBER TERM, 1968

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE TEXAS AND PACIFIC RAILWAY COMPANY AND THE TEXAS AND PACIFIC MOTOR TRANSPORT COMPANY,

Plaintiffs-Appellants,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, and PERMIAN BASIN RAILROAD COMPANY,

Defendants-Appellees.

On Appeal From the District Court for the Northern District Of Texas, Dallas Division

JURISDICTIONAL STATEMENT

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THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, and PERMIAN BASIN RAILROAD COMPANY,

Defendants-Appellees.

On Appeal From the District Court for the Northern District Of Texas, Dallas Division

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JURISDICTIONAL STATEMENT

Appellants, The Atchison, Topeka and Santa Fe Railway Company, The Texas and Pacific Railway Company, and The Texas and Pacific Motor Transport Company, appeal from the judgment of the United States District Court for the Northern District of Texas, Dallas Division, entered May 17, 1968 as amended on June 26, 1968.

Opinions Below

The Report and Recommended Order of the Interstate Commerce Commission Hearing Examiner, not reported, is attached as Appendix 1.*

The Report and Decision of the Interstate Commerce Commission, reported as *Permian Basin Railroad Co. Construction Between Odessa and Seagraves, Texas,* 330 I.C.C. 256 (1967), is attached as Appendix 2.

The opinion of the three-judge District Court, not yet reported, is attached as Appendix 3.

Jurisdiction

This action was brought by appellants in the District Court for the Northern District of Texas, Dallas Division, under 28 U.S.C. §§ 1336, 1398, 2284 and 2321-25 and 49 U.S.C. § 17, to enjoin and set aside an order of the Interstate Commerce Commission entered in Finance Docket No. 22475, in which the Commission rejected the findings and conclusions of the Hearing Examiner and authorized construction of a new railroad line by the Permian Basin Railroad Company between Seagraves and Odessa, Texas.

A three-judge court was convened pursuant to 28 U.S.C. §2325. The judgment of the three-judge court, approving the Commission's order, was entered May 17, 1968, and was amended on June 26, 1968. Appellants filed notice of appeal in the court below on July 15, 1968.

Jurisdiction of this Court to hear this appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b), and is sustained by *Interstate Commerce Commission* v. *New York, New Haven & Hartford Railroad Co.,* 372 U.S. 744 (1963).

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* Because of its length, the report of the Hearing Examiner, together with the report of the Commission and the opinion of the court below, are printed in a separately bound volume.

Questions Presented

Permian Basin Railroad Co., a corporation which is not owned by or related to any other carrier or industry, applied for Commission approval to construct an 80-mile branch line railroad in west Texas.

After extensive hearings, the Interstate Commerce Commission's Hearing Examiner made detailed findings regarding Permian Basin's projected income and expenses, and concluded that the proposed railroad would operate at an annual deficit of over $400,000. He recommended that Permian Basin's application be denied.

On review, without enunciating a factual basis for rejecting its Examiner's findings, and without making fact findings of its own, the Commission asserted that Permian Basin would incur an annual loss of $250,000 if the incorporators' proposed method of financing was approved, but that Permian Basin could anticipate a $50,000 annual profit if construction costs of over $9,000,000 were funded solely by equity capital. The Commission stated that ". . . Within reasonable limits, residents of the area involved should be permitted to assume the risks involved in constructing a railroad. . . ." The Commission approved Permian Basin's application.

The three-judge court approved the Commission's order, holding that the Commission was not required to make findings as to Permian Basin's anticipated expenses and income, and that the claimed need for the proposed railroad and the willingness of investors to fund the project required approval of the application "irrespective of profitability."

This decision gives rise to the following questions:

1. Did the court below err in approving the Commission's unprecedented *laissez faire* doctrine, irrespective of the evidence that the proposed line will in all likelihood not be able to operate profitably?

2. Did the Commission fail to make its own determination of whether the proposed railroad should be constructed, and instead abandon that function to Permian Basin's incorporators?

3. Is there any substantial evidence to support the Commission's conclusion that Permian Basin's application should be granted?

4. Is the Commission's report so lacking in factual findings that the protestants have been deprived of their right to obtain meaningful judicial review of the Commission's decision?

STATEMENT*

Permian Basin, a Texas corporation, applied to the Commission for authority to construct and operate a freight railroad approximately 80 miles long, between the end of the Santa Fe branch line tracks at Seagraves, Texas and the T&P main line tracks at Odessa, Texas. A map of the

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* Abbreviations used in this brief are:

Permian Basin Railroad Company—"Permian Basin."

The Atchison, Topeka & Santa Fe Railway Company and its subsidiaries—"Santa Fe."

The Texas & Pacific Railway Company and its subsidiaries—"T&P."

"Tr. ....." refers to the transcript of hearings before the Hearing Examiner which is included in the record on appeal filed in this Court.

proposed route appear as Appendix A to this statement, page 32; see also Appendix B to this statement, page 33.

The proposed line would traverse Andrews County and parts of Ector and Gaines Counties, Texas. It would provide more convenient service to less than 25% of the residents of these three counties, since existing lines are closer than the proposed line to the great majority of residents. (App. 1, p. 6-7, 64; App. 2, p. 78-79, 98)**

The area is also served by a number of responsible trucking companies and many irregular-route oil field haulers, which operate under Commission authority on the area's well developed highway system (see Appendix C to this statement), as well as by an extensive oil and gas pipeline system. (App. 1, p. 64-65; App. 2, p. 98; Tr. 1920.)

Permian Basin has no control over or ownership in any other carrier or business, nor it is controlled by any carrier, corporation or person, and it is not connected with any industry which might use the proposed line. Its sole function is to construct and operate the proposed short line railroad. In order to raise funds for construction of the line, purchase of equipment and initial costs—estimated at more than $9,000,000—the incorporators of Permian Basin propose to petition the Commission for authority to sell (i) $5,000,000 in common stock and (ii) $5,000,000 in 6% bonds; this petition will be presented to the Commission pursuant to 49 U.S.C. § 20(a) if and when final approval is received by Permian Basin to construct and operate the proposed line. (App. 1, pp. 3, 24, 62.)

Hearing Examiner Edmund T. Fritz received evidence on 35 days (4,610 pages of transcript, 92 exhibits). The

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**Almost 70% of the 116,712 persons in these three counties reside in Odessa and Seagraves and thus already have rail service immediately available.

chief issue was whether Permian Basin would be able to operate the proposed line profitably, or whether (as protestants contended) the line was destined for financial failure.

In February, 1966, the Hearing Examiner issued his report recommending denial of Permian Basin's application. In a detailed, commodity-by-commodity analysis of the evidence, the Examiner found many of the Permian Basin estimates of income to be grossly overstated. He found that the proposed line would incur a deficit of over $400,000 in its first year of operation, including $300,000 debt service expense, and that the deficit would increase in each succeeding year. (App. 1, pp. 62 to 63, 75.)

Permian Basin filed exceptions to the Examiner's report.* In March, 1967 the Commission announced its decision rejecting the Examiner's recommendation and approving Permian Basin's application. (App. 2, pp. 73 to 93.) Three members of the Commission dissented. (App. 2, pp. 94-100.)

Permian Basin's Estimated Income and Expenses

Permian Basin projected that its first year revenues would be $1,754,343, and its operating expenses $981,665, for net railway operating income of $772,678. (App. 1, pp. 27, 68.) The protestants estimated Permian Basin's revenue at $256,950, operating expenses at $415,987, for a first year operating deficit of $159,037. This estimate did not include debt service expenses. (App. 1, p. 75.) The Hearing Examiner made detailed findings of fact concerning Permian Basin's estimates of traffic and

* The exceptions were originally assigned to the Finance Review Board and then recalled by the full Commission.

expenses, and he projected a first year operating deficit of over $100,000, plus debt service expense of $300,000, for "an annual overall deficit exceeding $400,000." (App. 1, pp. 62-63.)

The Commission's report deals with Permian Basin's projected income and expense in a vague and peremptory fashion. *Without explaining the source of its figures,* the Commission estimated that Permian Basin's first year revenue would be approximately $600,000 with expenses of about $550,000, for net operating income of $50,000; *this estimate does not include debt service expense, projected by Permian Basin at $300,000 per year.* (App. 2, pp. 88-89.)

Following is a brief discussion of the principal items in controversy concerning Permian Basin's projected income and expenses.

Sugar beets. Permian Basin estimated that in 1964 250,000,000 pounds of sugar beets would be grown in Gaines County, and that Permian Basin would carry the beets 196 miles from Seminole to Hereford, Texas, producing revenues of $104,710. (Tr. 998-1048.) This estimate was *three times* the entire sugar beet production in all of Texas in 1963. (App. 1, p. 35.)*

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* "Texas Field Crop Statistics," Bulletin 45, February, 1968 (published by the United States and Texas Departments of Agriculture), page 29.

Other exaggerations permeated Permian Basin's estimates of income. Even the Commission was unable to subscribe to Permian Basin's estimate of annual revenue of $314,447 for hauling 365,000,000 pounds of iron ore (i) from non-existent mines (ii) in an area in which no iron ore survey had been made (iii) over spur tracks which Permian Basin did not intend to construct.

Both the Examiner and the Commission agreed with protestants that Permian Basin could expect *no* iron ore traffic in the first five years of operation. (App. 1, pp. 35 to 37; App. 2, pp. 85 to 86.)

The Examiner found, "No reasonable prospect has been demonstrated that sugar beets will be transported during the 5 year period." He based this finding on three factors, *viz.*, (1) no sugar beets had been grown in the area during or prior to 1962 and in 1963 only a few test plantings had been made; (2) the practice in the sugar industry is to locate refineries so that the beets move no more than 50 miles from field to refinery, and no evidence was introduced that there would be an exception made to this practice in Gaines County; and (3) the refinery to which Permian Basin expected to ship the beets, in Hereford, Texas, has its entire quota of sugar beets allotted by the Secretary of Agriculture to an area north of Permian Basin's proposed line. (App. 1, p. 35.)

In its exceptions to the Examiner's report (p. 137), Permian Basin admitted that its projection of sugar beet traffic "is speculative." The majority of the Commission nevertheless rejected the Examiner's finding, saying "Although only test planting of sugar beets has been started in the area, it is reasonable to conclude that applicant would derive some revenue from sugar beet traffic during the first five years of operation and that its estimate is not unduly optimistic." (App. 2, p. 86.) The Commission accepted Permian Basin's speculation that beets would be grown in Gaines County* and that growers would ship the beets more than 50 miles to the Hereford refinery; no mention is made in the Commission report of the quotas allocated by the Secretary of Agriculture.

Coarse grain. Permian Basin estimated that in the first year it would carry 351,889,000 pounds of coarse grain, producing revenues of $381,120.73.

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*Appellants' counsel have verified that the test plantings have been abandoned and that no sugar beets are presently being grown in Gaines County.

The Examiner found that Permian Basin would carry 516,250 pounds, for revenues of $30,519. He observed that Permian Basin's estimates included *(inter alia)* (1) grain which farmers and elevator operators had testified they would not and could not ship by the proposed line; (2) multiple counts of the same grain; (3) grain which could not be shipped by rail without construction of spur lines not included in Permian Basin's construction plans; (4) grain which would be consumed locally by substantial numbers of horses and cattle; and (5) grain grown in areas closer to other railheads than to the proposed line. (App. 1, pp. 40 to 42.)

Without discussing any of the evidence or factors cited by the Examiner, the majority of the Commission said (App. 2, p. 87):

> ". . . We believe that the examiner erred in accepting the protestants' estimates, although we agree that applicant would not secure all the traffic in coarse grain in the two-county area. Although it is not possible to predict the precise amount of coarse grain traffic that would be moved by applicant, it is clear that, considering the vast production of grain in Gaines and Andrews Counties, and the adaptability of this commodity to rail transportation, applicant would secure a much larger share of this traffic than was estimated by the protestants."

The majority made no finding as to what revenues could be anticipated from coarse grain traffic.

Oil field supplies. Permian Basin's incorporators asserted that a primary purpose of the proposed line was to offset the effects of declining oil and gas exploration and development activity in the area, which had already caused a decline in its economy. Permian Basin nevertheless esti-

mated that in its first year it would derive $131,237 from transporting 64,870,888 pounds of oil field supplies.

The Examiner found, however, that first year revenues for oil field supplies would be only $2,268. He based his finding upon testimony of the area's principal suppliers and oil company users of oil field supplies that they would not ship over the proposed line because establishing new stockpiles of supplies at either Andrews or Seminole would largely duplicate those already maintained at Odessa and Hobbs, which are within a 100 mile radius of the producing area. They testified that the small savings in trucking costs would be more than offset by added inventory costs. (App. 1, pp. 37 to 38.)

The majority of the Commission said, ". . . We cannot accept the protestants' premise that no change in the distribution system would result from constructing a railroad in this prosperous oil producing area. In our opinion, applicant's estimate is more realistic than that of the protestants." (App. 2, p. 87.) The majority did not discuss the testimony relied upon by the Examiner, nor did it make any finding as to the revenue it believed would be obtained from this traffic.

Other commodities. The only discussion in the Commission's report regarding 36 other commodities is the following statement (App. 2, pp. 87-88):

> "Several other commodities, such as new automobiles, anhydrous ammonia, cotton, and petroleum products were either excluded from the examiner's revenue projections for the first year operation, or were credited with only a minimal amount of prospective revenue. We believe that applicant's study performed by local residents with intimate knowledge of the area, supports a much larger revenue projection than that accepted by the examiner."

The Commission gave no explanation of the "much larger revenue projection" or the expected income and expense allocable thereto. In fact, the detailed findings of the Examiner regarding these commodities demonstrate that the Commission's generalities are without foundation. For example:

Cotton. Permian Basin estimated 86,350,000 pounds of cotton would travel the new road with revenues of $151,113. After detailing the evidence as to why a changeover from present truck transport was improbable, the Examiner accepted protestants' estimates of tonnage of 22,140,900 pounds and revenues of $68,748 as "more realistic." (App. 1, pp. 45 to 46.) The Commission did not discuss any of the evidence concerning cotton traffic.

Automobiles and parts. First year traffic in automobiles and parts was estimated by Permian Basin at 9,930,040 pounds producing revenues of $77,003. The Examiner discussed in detail the evidence which established that the auto industry has converted to rail-truck movements, using tri-level and bi-level cars which are unloaded by special unloading equipment at distribution points; each installation costs over $100,000. The automobiles are then trucked or driven to dealers from those points. Since the automobile industry has not used Odessa and Midland as distribution points, even though those cities are on the T&P main line, he found that it was unrealistic to expect that distribution points would be located at the smaller cities of Andrews or Seminole. (App. 1, p. 39.) The Commission did not discuss any of the evidence concerning automobiles and parts.

Beer. Permian Basin estimated that in its first year it would transport 26,650,000 pounds of beer from Golden, Colorado, to Odessa with revenues of $35,475. This is the

amount of beer moved in 1962 from Golden to a distributor located near Odessa. The evidence established, however, that the distributor ships by his own tractor-trailer despite the presence of a nearby rail line because "rail costs were higher than his trucking costs." The Examiner therefore found that no revenue could be anticipated from beer. (App. 1, pp. 39-40.) The Commission did not refer to beer in its report.

Cement. Permian Basin projected first year cement traffic of 21,991,252 pounds, producing revenue of $16,821. The Examiner found that a substantial part of this cement presently moves from Maryneal to Brownfield, Texas via the Santa Fe, and would not be transported over the proposed Permian Basin line because this would entail shipping the cement a greater distance than at present, with transfers to three different railroads *en route.* Based upon testimony of shipper witnesses, the Examiner found that another 3,500,000 pounds of cement, presently trucked from Duro to Andrews, Texas, would not be changed to a more expensive, less efficient combination of truck and rail. The Examiner concluded that Permian Basin could reasonably expect to ship 12,711,900 pounds of cement for revenues of $10,257. (App. 1, pp. 43 to 44.) The Commission did not refer to cement in its report.

Sand. Permian Basin estimated it would carry 9,153,730 pounds of sand, producing revenue of $5,309. The Examiner found that added loading and unloading expenses required if the shippers sent their sand by rail rather than truck (both routes involving the same number of miles), made prospective revenues of any more than $380 unrealistic. (App. 1, pp. 44 to 45.) The Commission did not refer to sand in its report.

Expenses. Regarding Permian Basin's anticipated expenses, the Commission said (App. 2, p. 88):

> ". . . With revenues of $600,000 a year and projecting railway costs in the same general way employed by protestants in their exhibits, applicant would incur costs in the neighborhood of $550,000 . . ."

Contrary to this assertion, the majority of the Commission did not project railway costs as protestants had. Protestants submitted detailed exhibits and almost 900 pages of testimony in explaining each item of Permian Basin's anticipated costs. The majority made no such breakdown, nor any summary or finding, nor did it otherwise explain its basis for rejecting the Examiner's findings as to estimated costs.

The rationale of the Commission majority.

Without explanation of the basis for its figures either as to income or expense, a majority of the Commission said (App. 2, p. 88):

> ". . . The most reasonable estimate warranted by the evidence of record is that revenue for the first year would be in the neighborhood of $600,000. This estimate is based on movements of sugar beets, grain, new cars, petroleum products, fertilizer, lumber and other commodities in volumes considerably greater than those estimated by protestants and considerably less than estimated by applicant. With revenues of $600,000 a year and projecting railway costs in the same general way employed by protestants in their exhibits, applicant would incur costs in the neighborhood of $550,000 and derive net income of about $50,000. *Such net income would fall far short of the $300,000 debt service expense contemplated by applicant.*" (Emphasis added.)

Thus, the majority recognized that if bonds were sold as Permian Basin's incorporators proposed, Permian Basin's

expenses would be more than one-third greater than its income. The majority said, however, that the debt service expense of $300,000 might not be incurred because when Permian Basin petitions the Commission for authority to issue securities, the Commission might deny permission and instead order the construction and operation funds to be raised by sale of stock or contingent income bonds. (App. 2, p. 93.)

The majority said (App. 2, p. 89):

> "This is an unusual case. In an age of declining rail mileage, this proceeding stands out as a proceeding to construct a new railroad. The applicant and the residents of the area have shown great faith in the future growth of the three counties involved. Within reasonable limits, residents of the area involved should be permitted to assume the risks involved in constructing a railroad. If those most directly concerned are willing to risk their capital with full knowledge of all relevant circumstances, the Commission should be most reluctant, for reasons of paternalism, to deny them an opportunity to improve the economy of their area. This is particularly true where the area involved has been largely dependent on the prosperity of a single industry but may with the aid of adequate rail service develop a more diversified economic base. There is a substantial reservoir of traffic available in the area and applicant should not be denied an opportunity to tap it unless the Commission is reasonably certain that its knowledge of local economic conditions exceeds that of those in the area who are prepared to invest in its future."

The Commission relied on *Construction of Line by Wenatchee Southern Ry. Co.*, 90 I.C.C. 237 (1924), as "the controlling precedent for the disposition of this proceeding." (App. 2, pp. 90 to 92.)

The rationale of the dissenting Commission members.

The three dissenting members of the Commisison argued that the majority's decision was "based not on law or fact, but on faith, hope and charity and in disregard of the statutory mandate." (App. 2, p. 94.) They said (App. 2, p. 98):

> "A realistic analysis of the applicant's evidence makes it manifest that about 50% of the anticipated traffic would not materialize."

The dissenters were of the opinion that the proposed line had little chance of success and that its failure would fall as a burden upon the "transport system generally." (App. 2, p. 100.)

With respect to the majority's concern about local interest in the proposed line, the dissenters said (App. 2, pp. 98 to 99):

> "Nor is the evidence convincing that the local people have 'a full knowledge of all relevant circumstances' as is implied in the majority report, or that they are willing to risk their capital on the basis of the promotional activity. The record shows that 13 individuals who are promoting the enterprise have paid in $5,000 or about 1/20 of one percent of the estimated amount needed to construct the railroad. An additional $40,000 was paid in by others in return for an assignment of stock subscription rights; the total amount paid in being less than ½ of one percent of the construction costs.
>
> "This indicates a marked hesitancy on the part of all concerned. And in view of that, this Commission should be most reluctant to signify approval on the basis of this tenuous record, particularly since that approval and the finding that the railroad is needed to satisfy the requirements of the public convenience and necessity, can, in turn, be used to help market the applicant's securities. Regardless of how the enter-

> prise is financed, whether by borrowed funds or the sale of stock, the ordinary legal safeguards upon which the public relies in dealing with securities in general will not apply. For the issuance of carrier securities is under the surveillance of this Commission. It ill behooves this Commission, therefore, to issue a report which, in effect, gives every indication that the proposed rail operation will be a glowing success. It should be made perfectly clear, as was done in the *Wenatchee Southern* case, *supra*, that the enterprise shows little promise of success."

The dissenting members of the Commission stated further that "the majority report's analogy to the *Wenatchee Southern* case is entirely inapt," since "that case was decided in 1924 prior to the development of a significant motor carrier industry" and further because "it involved a one-product (apples) area totally dependent upon rail service." They pointed out the great hesitancy upon the part of the Commission to authorize the building of the Wenatchee Southern (the vote was 5 to 5 with one reluctant concurrence in favor of the grant), and that after two extensions the certificate was allowed to expire and the Wenatchee Southern line was never built. The dissenters stated (App. 2, pp. 99 to 100):

> "If anything, the history of the Wenatchee Southern should stand as a lesson in the hard facts of economic life and be a warning that, where little need, if any, exists for more transport facilities, additional facilities are likely to falter, and their burden will fall upon the transport system generally."

The Commission denied protestants' petition for reconsideration. Protestants then filed suit in the United States District Court of Texas, Dallas Division, for review of the Commission's decision. A three-judge court was convened pursuant to 28 U.S.C. §§2284 and 2325.

The ruling of the three-judge court.

On May 17, 1968, the court approved the order of the Commission. In a brief opinion, the court said that the "presence of a great need in the Permian Basin for the proposed railroad balanced against only a minimal threat of hardship to other carriers provides an adequate basis for the Commission's order, *irrespective of profitability.*" (Emphasis added.) The court did not discuss any of the evidence introduced before the Examiner. As had the Commission, the court cited the *Wenatchee Southern* case to support its decision.

Appellants filed their notice of appeal to this Court on July 15, 1968.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

I.

THE COMMISSION'S ORDER AND REASONING EMBODY AN UNPRECEDENTED LAISSEZ FAIRE DOCTRINE WHICH IS IN CONFLICT WITH THE POLICY UNDERLYING THE TRANSPORTATION ACT OF 1920.

The authorization of the proposed Permian Basin railroad runs counter to the very policy which in 1920 caused Congress to require Commission authority before new railroads are constructed.

The simple truth, clearly demonstrated by this record, is that the area to be served cannot and will not support the proposed line. Even on the Commission's euphoric view of the evidence, a $250,000 annual deficit will be incurred if Permian Basin is financed as its incorporators propose. The court below upheld the Commission's order only by ignoring the applicable principles and adopting a new test which operates "irrespective of profitability."

The Commission and the court below, without any meaningful discussion of the evidence, repudiated the findings of the experienced Hearing Examiner that construction of the new line will not serve the public convenience, and adopted instead a *laissez faire* philosophy regarding new railroads, stating (App. 2, p. 89):

> . . . "If those most directly concerned are willing to risk their capital with full knowledge of all relevant circumstances, the Commission should be most reluctant, for reasons of paternalism, to deny them an opportunity to improve the economy of their area. . . . There is a substantial reservoir of traffic available in the area and applicant should not be denied an opportunity to tap it unless the Commission is reasonably certain its knowledge of local economic conditions exceed that of those in the area who are prepared to invest in its future."

The court below approved and applied this new test (App. 3, p. 105):

> ". . . The presence of a great need in the Permian Basin for the proposed railroad balanced against only a minimal threat of hardship to other carriers provides an adequate basis for the Commission's order, *irrespective of profitability.*" (Emphasis added.)

Quite apart from the lack of evidence to support the finding of "a great need in the Permian Basin for the proposed railroad," this novel standard represents a radical departure from past policy and decisions, and indicates that the Commission has adopted the very approach toward new railroads which Congress sought to abolish in the Transportation Act of 1920 (49 U.S.C. §§ 1 *et seq.*). This ruling is unprecedented and erroneous. The Court should intercede now to prevent further applications of this misguided concept.

Legislative history.

The recognition that unprofitable railroads present a burden to other railroads, the transportation system generally and the public, was one of the principal factors which led Congress to enact the Transportation Act of 1920. In that Act, the Commission was empowered to regulate all new construction, extensions, acquisitions and abandonments of railroads. The legislative history of Section 1(18)—which requires Commission approval *before* any new railroad line may be constructed—discloses that it was intended to avoid the problems inevitably created by "weak roads" by preventing construction of lines, such as the proposed Permian Basin line, which hold little promise of financial success.

Just prior to the passage of that Section, Representative Esch, Chairman of the House Committee on Interstate and Foreign Commerce, made the following statements to the full Committee (58 Cong. Rec. 8316 (Nov. 11, 1919)):

> "We believe one main cause of the so-called 'weak sister' has been the unrestricted right of railroads to build wherever their projectors thought fit.
>
> * * *
>
> "How does this bill stop that? In this way: Before a road or an extension thereof can be built, it must get what is called in this bill a certificate of convenience or necessity from the Commission as a condition precedent to the building of a single rod of the extension or of the new line.
>
> * * *
>
> "This is not new law. Several of the states have this same kind of law now, notably the State of New York and the State of Wisconsin and other states, and the law has worked successfully. It has prevented the construction of new lines that could not by any possibility have any hope of meeting operating expenses,

not to say anything about profits. *It would prevent the construction of some of these shortlines which may have no hope of ultimate financial success.*" (Emphasis added.)

The national transportation policy of Congress is expressly stated in a preamble to the Transportation Act (49 U.S.C. §§ 1 *et seq.*): ". . . to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers . . ."

Senator Cummins, speaking to the Senate, pointed out how the desire to profit on the sale of securities and on construction of new railroads had led to the building of economically unfeasible lines (59 Cong. Rec. 748 (Dec. 17, 1919)):

> "If there is any one thing from which the transportation system of the country, taken as a whole, is now suffering, it is from the unguided, uncontrolled right of owners to build railroads whenever they may see fit to build them and whenever they can avail themselves of an opportunity to sell at a profit the securities based upon the supposed construction.
>
> * * *
>
> ". . . A great many have been built that never should have been constructed. We are now under the disadvantage of having developed a system which must be maintained because communities have been built along the railways, and their interests cannot be disregarded in regulations which we shall adopt. The whole trouble to which I referred in my opening statement has arisen because of the building of railways simply to make money out of their construction and without regard to the possible profit of their operation."

These were not idle speculations, nor are they out of date. One of the officers of Permian Basin is in the used railway equipment business, and another is a real estate developer who owns 9,500 acres of land near the proposed line. (Tr. 1711, 1851-84.) The incorporators intend to sell millions of dollars worth of stock to the public.

This Court is well aware of this legislative history and policy. Mr. Justice Brandeis spoke of it in *Texas & Pacific Ry. Co.* v. *Gulf, Colo. & Santa Fe Ry. Co.*, 270 U.S. 266, 277 (1926):

> "By that measure [the Transportation Act of 1920], Congress undertook to develop and maintain for the people of the United States, an adequate railway system. It recognized . . . that the building of unnecessary lines involves a waste of resources and that the burden of the waste may fall on the public."

Prior Commission decisions.

It is revealing that the only case cited by the Commission and the court below to support approval of Permian Basin's application is the 1924 *Wenatchee Southern* case, in which a group of apple growers who desired the services of the proposed line had agreed to subsidize the railroad's losses. The Commission's certificate of authority lapsed unused four years after it was granted.

Never before in its history has the Commission approved an application to construct a new railroad which is unrelated to another carrier or to an industry, where the Commission's own estimates of income and expense show that the railroad will probably operate at a loss from the very outset.

Until now, the Commission has recognized that, as a fact of economic life, an unsubsidized business must either operate at a profit or go into bankruptcy.

Pursuant to its new *laissez faire* attitude, the Commission asserted that the risk of loss would fall on the investors, not the public. But the Commission itself supplied the answer to that misguided theory in *Application of Michigan Northern R.R. Co.*, 65 I.C.C. 480, 485 (1920). In denying a certificate, the Commission said:

> ". . . The present record, however, raises serious doubts regarding the probable success of the project. If the new line should be constructed, many people would doubtless build homes, schools, churches, and commercial and industrial establishments which, once constructed, would become and remain primarily dependent upon the projected railroad. In the event of failure of the new line these people would generally suffer more heavily than those who invest their money directly in the enterprise."

Similarly here, those who may construct places of business in reliance upon the new line will suffer with the investors in the railroad.

For some reason, the Commission overlooked the public interest in avoidance of unnecessary facilities. The lack of probable profit is indicative of lack of need for the service. This was recognized by the Commission in *Kansas & Oklahoma R. Co. Acquisition and Proposed Construction*, 180 I.C.C. 239, 246 (1931) in which authority to construct a new line of railroad was denied:

> ". . . The agricultural area is already highly developed, is adequately supplied with outlets, and apparently receives satisfactory transportation service. There is no reasonable assurance that the extended line would enjoy enough traffic to operate profitably. . . . In brief, this independent short line would place a burden on the transportation system, which, as we have frequently pointed out, is most undesirable from the standpoint of the public interest."

See also, *Application of the Golden Belt Railroad of Kansas,* 67 I.C.C. 370, 372-3 (1921) ("... The fundamental objection to the proposal is that the traffic which may reasonably be expected is inadequate to support the project ..."); *Monon Railroad Construction and Operation,* 324 I.C.C. 208 (1965); *Ozark & P.V. Ry. Co. Construction,* 166 I.C.C. 441, 447 (1930); *Construction of Line by M. & S.V. Railroad,* 99 I.C.C. 606, 608 (1925).

Today, the Commission is overtaxed with applications for abandonment of short line railroads. A list of 146 branch and short line abandonments between 1942 and 1967 is printed as Appendix 4, pages 107 to 115 of the separately bound appendix volume.

Owing to drastically altered modes of transportation, the nation's largest railroads have found it necessary to merge with one another in order to eliminate wasteful duplication of facilities and to avoid fatal losses. See, for example, *Penn-Central Merger and N. & W. Inclusion Cases,* 389 U.S. 486 (1968).

In light of this trend, it makes no sense to authorize construction of a new railroad under conditions which all members of the Commission admit make success very doubtful and financial disaster a likelihood.

The Commission's function is to bring to bear its expertise and to determine on which side of a particular controversy the public interest lies. *United States* v. *Detroit & Cleveland Navigation Co.,* 326 U.S. 236, 241 (1945). Even if speculators can be found to assume the risks involved, the local communities and business people who make substantial expenditures in reliance on the railroad will not be protected against the burden which will ultimately be imposed by the road's failure. Bankruptcies and

reorganizations are necessarily harmful to the economy. Any slight benefit to local shippers in securing competitive services does not adequately offset the burdens and risks to the general community as a result of an unnecessary duplication of existing truck and rail facilities.

In the light of the dangers which the decision appealed from holds for the transportation industry and the public, this Court should summarily reverse the order of the court below.

II.

THE COMMISSION ABDICATED TO THE INCORPORATORS OF PERMIAN BASIN ITS STATUTORY DUTY TO DETERMINE WHETHER THE PROPOSED LINE SHOULD BE CONSTRUCTED.

Instead of discussing and weighing the evidence, as the Examiner did, the Commission abandoned this function to the applicant, stating, "Applicant should not be denied an opportunity . . . unless the Commission is reasonably certain that its knowledge of local ecenomic conditions exceeds that of those in the area who are prepared to invest in its future." (App. 2, p. 89.) But the Commission, not the applicant, should determine whether a proposed new railroad will probably be successful before authorizing construction, and it should do so on the basis of the record, not the enthusiasm and optimism of the applicant.

The dissenting members of the Commission called attention to this defect in the majority's report (App. 2, pp. 94, 96):

> "Whatever may be the merits of these propositions, a decision based thereon is a decision based, not on the law or facts, but on faith, hope and charity, and in

disregard of the statutory mandate. In a purely private matter not affecting the public interest in a substantial or essential way, I would unhesitatingly support the proposition that people should be free to invest, risk, or spend their own money in any legitimate way they choose. But this is not such a matter. We are here concerned with a project imbued with the public interest, and one for which Congress has laid down definite standards. Section 1(18)-(20) of the Act (under which the application was filed), and the national transportation policy, establish the legal requirements and our guide for decision. They impose upon the applicant an obligation to show that the proposed line is required by the public convenience and necessity; and upon the Commission, a duty to decide the case on the basis of that showing, and not on presumption.

* * *

"It is plain, therefore, that when this Commission, in appraising the record, insists upon an applicant sustaining the evidentiary burden imposed by law, it is performing its assigned duty with regard to the Nation's transport system, and is not exercising a gratuitous paternalism toward the entrepreneurs. Further, in performing this duty, the Commission is not free to confess lack of adequate knowledge, and, on that ground, defer to the judgment of the applicant and its promoters. If the applicant's evidence does not convince, then the application must be denied.

The Commission is obligated under the statute to make its own careful analysis of the evidence and to draw its own conclusions. It may not, as in the case at bar, shunt this responsibility to the applicant. The court below erred in approving the Commission's erroneous report.

III.

THE COMMISSION'S DECISION IS NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE.

Under Section 10(e) of the Administrative Procedure Act (5 U.S.C. § 706), this Court is empowered to set aside "agency action, findings and conclusions found to be . . . (E) unsupported by the substantial evidence in a case . . . "

We have set out above the highlights of the evidence relating to the expected income of the proposed line. A more detailed analysis of the evidence appears in the report of the Hearing Examiner (App. 1, pp. 26 to 50).

The Examiner's detailed and carefully reasoned report is a commendable exercise of expertise. His findings and conclusions are fully documented and are supported by the overwhelming weight of the evidence. Having heard the many witnesses, both interested and disinterested, having studied the evidence, and having received extensive briefs, he reached the conclusion that the proposed line will in all likelihood be unable to meet operating expenses, let alone operate at a profit.

The cogent reasons given by the Examiner for his recommended denial of a certificate were not answered in the majority's report. The majority conceded the likelihood that Permian Basin would be a financial failure, but then applied its erroneous *laissez faire* doctrine.

The decision of the court below should be reversed on the ground that the Commission's decision authorizing construction of the proposed line is not supported by any substantial evidence.

IV.

THE COMMISSION FAILED TO MAKE FINDINGS OF FACT AS REQUIRED BY LAW.

In the event the Court does not reverse the order appealed from for the reasons set forth in Parts I, II and III above, we ask the Court to remand the case to the Commission with directions that the Commission make findings of fact as required by law.

Section 8(b) of the Administrative Procedure Act [5 U.S.C. § 557(b)] requires in part that "all decisions . . . are a part of the record and shall include a statement of (A) findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." This section is applicable to the Commission whenever it rules on a petition for a certificate of public convenience or necessity. See *Riss & Co., Inc.* v. *United States,* 341 U.S. 907 (1951), reversing 96 F. Supp. 452 (W.D. Mo. 1950).

A careful search of the Commission's report fails to disclose any findings of fact as to the issues in the case. The Commission made no real findings on the key issues of Permian Basin's expected income, or the basis for its projection of expenses. The Commission denigrated the Examiner's findings, without making any of its own.

The Commission's majority report flies in the face of what this Court said in reversing a Commisison order in *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 295 U.S. 193, 201-202 (1935):

> "This court will not search the record to ascertain whether . . . general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain

to constitute a valid basis for the order. *In the absence of a finding of essential basic facts the order cannot be sustained.*" (Emphasis added.)

In *United States* v. *Chicago, M. St. Paul & P. R. Co.*, 294 U.S. 499, 510-11 (1935) this Court also stated:

> "The difficulty is that [the Commission] has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency [citing cases]. We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

See also *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167 (1962).

The Commission has violated its duty to make clear the basis for its decision in its report in this case. The phrases and sentences in the report may allow this Court to speculate as to what the Commission's reasoning was, but that is not enough. *United States* v. *Chicago, M., St. P. R. Co.*, 294 U.S. 499 (1935). Especially since the majority report does not have the underlying support of the Examiner's findings, this case should be remanded to the Commission for proper findings.

In responding to appellant's argument that the Commission's findings were insufficient, the court below said (App. 3, p. 105):

> ". . . Although the Commission did not compute a precise estimate of projected revenues and costs for each commodity, it did make an estimate of *total* revenues and costs, and, further, it named the commodities upon which it focused in revising the examiner's estimate. We believe this to be a sufficient finding of

profitability. To require greater specificity of the Commission in predicting the unpredictable is in our view unnecessary." (Emphasis the court's.)

The view thus expressed by the court below is directly contrary to the holdings of this Court and of many other federal courts, some of which are cited in the footnote below.* Particularly pertinent is the very recent case of *Soo Line Railroad Company* v. *United States*, 280 F.Supp. 907 (D. Minn. 1968), in which a three-judge court remanded the case to the Commission for additional findings, saying (280 F.Supp. at 918-919):

> "Its [the Commission's] finding that the traffic diversion from the Soo would be 'somewhere between the estimate of the applicants and of the Soo,' in our view amounts to no finding at all. . . ."
>
> * * *
>
> "We fully understand that the task of the Commission in determining potential diversion is a difficult and complex one, and that future events may prove that the Commission's findings were wide of the mark. But the very fact that these are difficult and complex matters makes it all the more necessary for the Commission to use its expertise, but use it, it must."

This is precisely what occurred in the case at bar. The Commission stated that its estimate of $600,000 annual revenue is based on movements of various commodities "in volumes considerably greater than those estimated by protestants and considerably less than estimated by applicant." (App. 2, pp. 88-89.) As stated in the *Soo Line* case, these so-called findings amount to no findings at all.

---

* *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U.S. 626 (1945); *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F.2d 554 (D.C. Cir. 1938), cert. den., *sub nom, Gross* v. *Saginaw Broadcasting Co.*, 305 U.S. 613 (1938); *Bell Lines, Inc.* v. *United States*, 263 F. Supp. 40 (S.D. W. Va. 1967).

The Commission itself has subsequently recognized that "findings" such as these are inadequate and lack the required specificity. Upon remand of the *Soo Line* case, the Commission issued a new report in which it stated (333 I.C.C. 236, 238, May 23, 1968):

> "In view of the reading evoked from the court by our prior report, it must be acknowledged that the necessary degree of specificity was lacking; and it is our purpose to correct that inadequacy."

Following these statements, the Commission discusses the estimates of the parties and then makes detailed findings on a car-by-car analysis of the various categories of cars potentially divertible from the Soo Line. Based upon these detailed findings, the Commission concludes that total diversion would be in a specific dollar amount.

Thus, by the Commission's own admission and performance in the *Soo Line* case, predictions of future events in the area of the Commission's expertise can be made with the required specificity and detail.

There are sound policy reasons for the requirement that the Commission detail its basic factual findings. Unless the Commission is required to do so, there is no assurance to the public, the courts or to Congress that it is performing its function of evaluating the evidence and deciding the issues according to its legislative mandate. Thus, in *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943), this Court said:

> ". . . the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."

See also *Capital Transit Co.* v. *Public Utilities Comm.*, 213 F. 2d 176 (D.C. Cir. 1953), cert. denied 348 U.S. 816 (1954).

The Commission's vague and indefinite report, if upheld, will deprive appellants of the judicial review to which they are entitled under Section 10(d) of the Administrative Procedure Act (5 U.S.C. § 706). The majority Commission report gives the reviewing court the alternatives of (1) searching the entire record *de novo* to determine whether the Commission was correct, which this Court has said it will not do (see *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 295 U.S. 193 (1935)), or (2) becoming a rubber stamp for Commission action, which courts cannot do (see *Chesapeake Motor Line* v. *United States,* 153 F.Supp. 812 (D.C. Md. 1957)).

The Commisison's failure to make adequate findings requires that the case be remanded to the Commission for further proceedings.

Conclusion

For the reasons stated herein, appellants respectfully pray that this Court reverse the order appealed from, either summarily or after plenary consideration.

Respectfully submitted,

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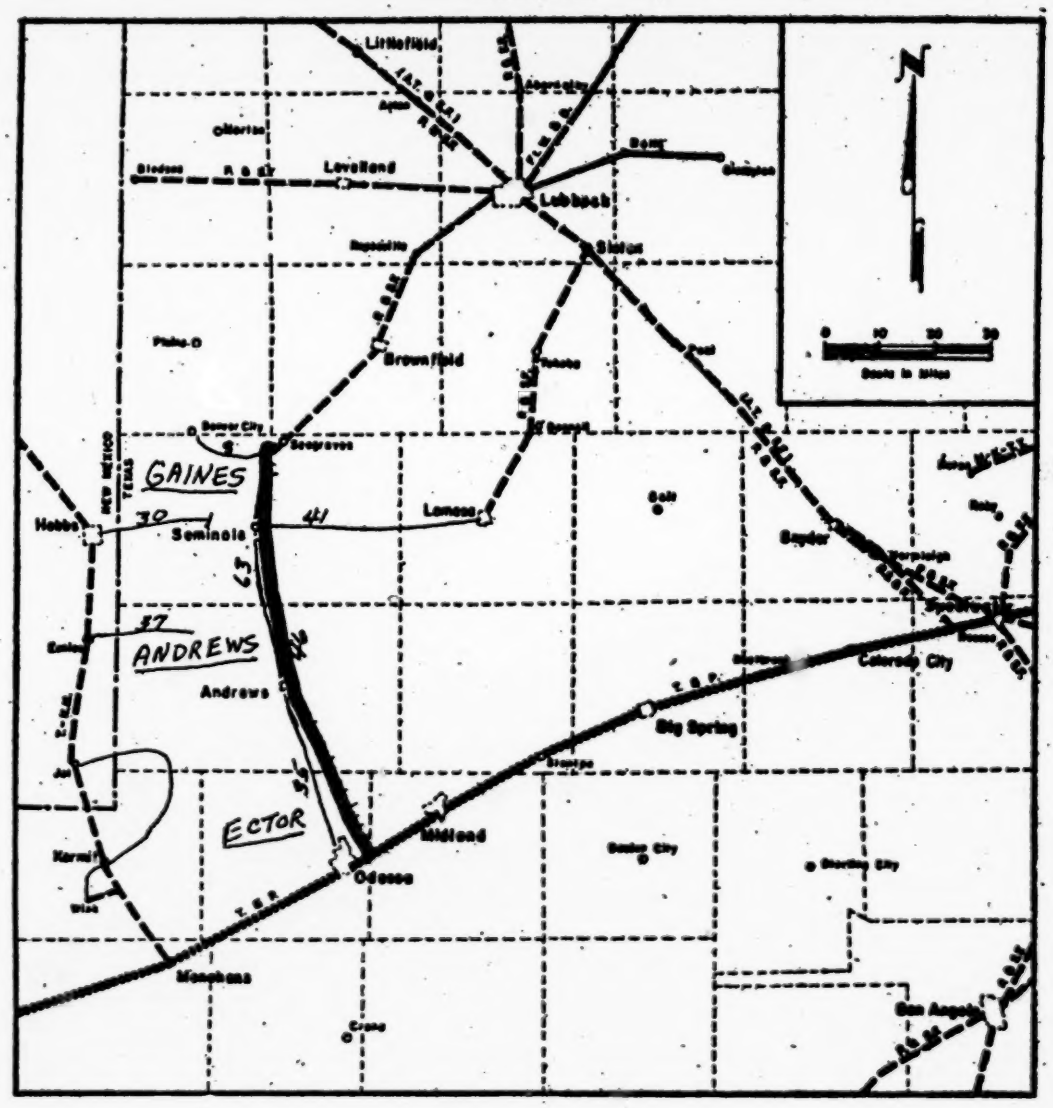
September 13, 1968

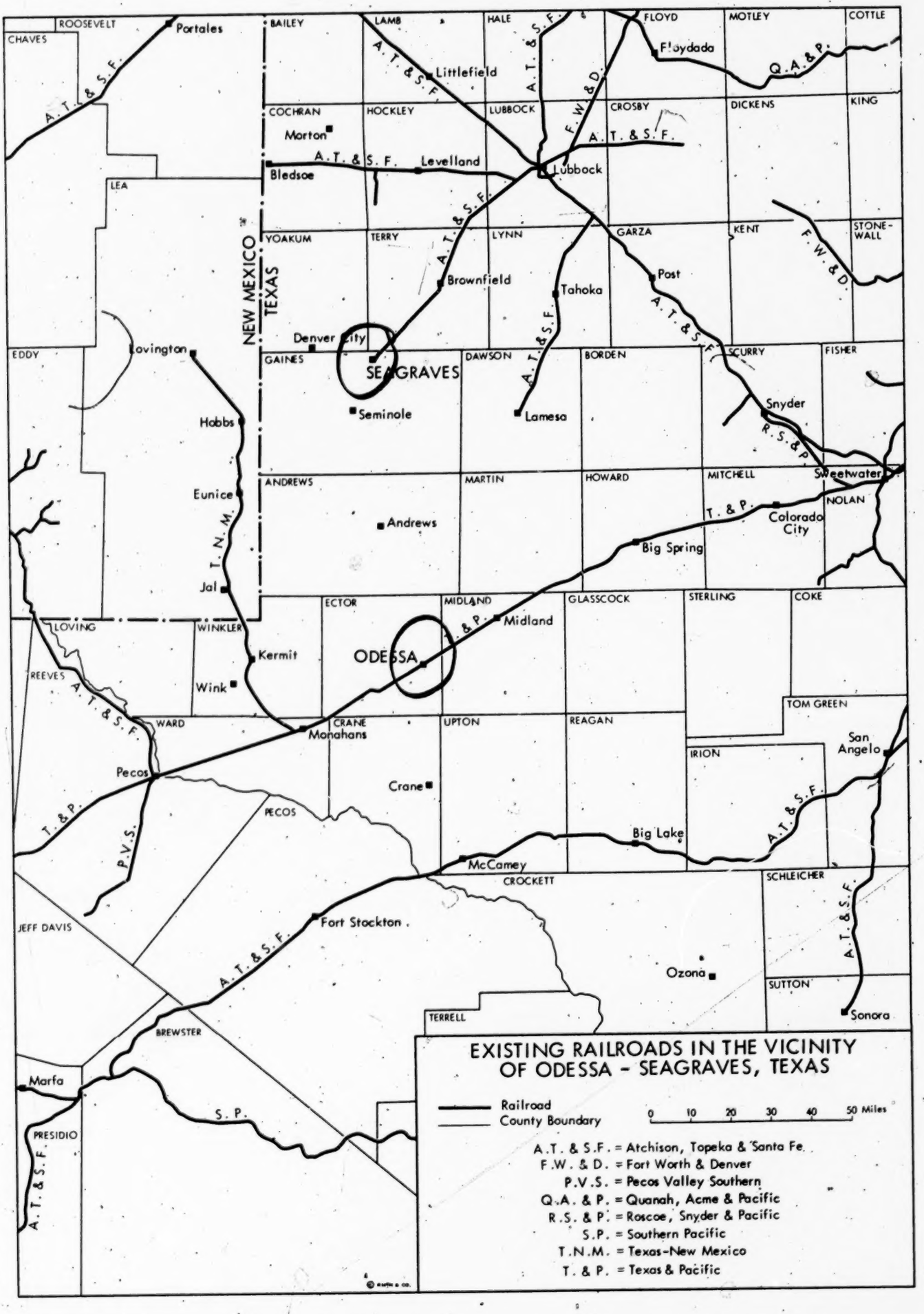
APPENDIX A

RAILROAD MAP OF THE PERMIAN BASIN AREA

F.D.No. 22473

AUGUST, 1963

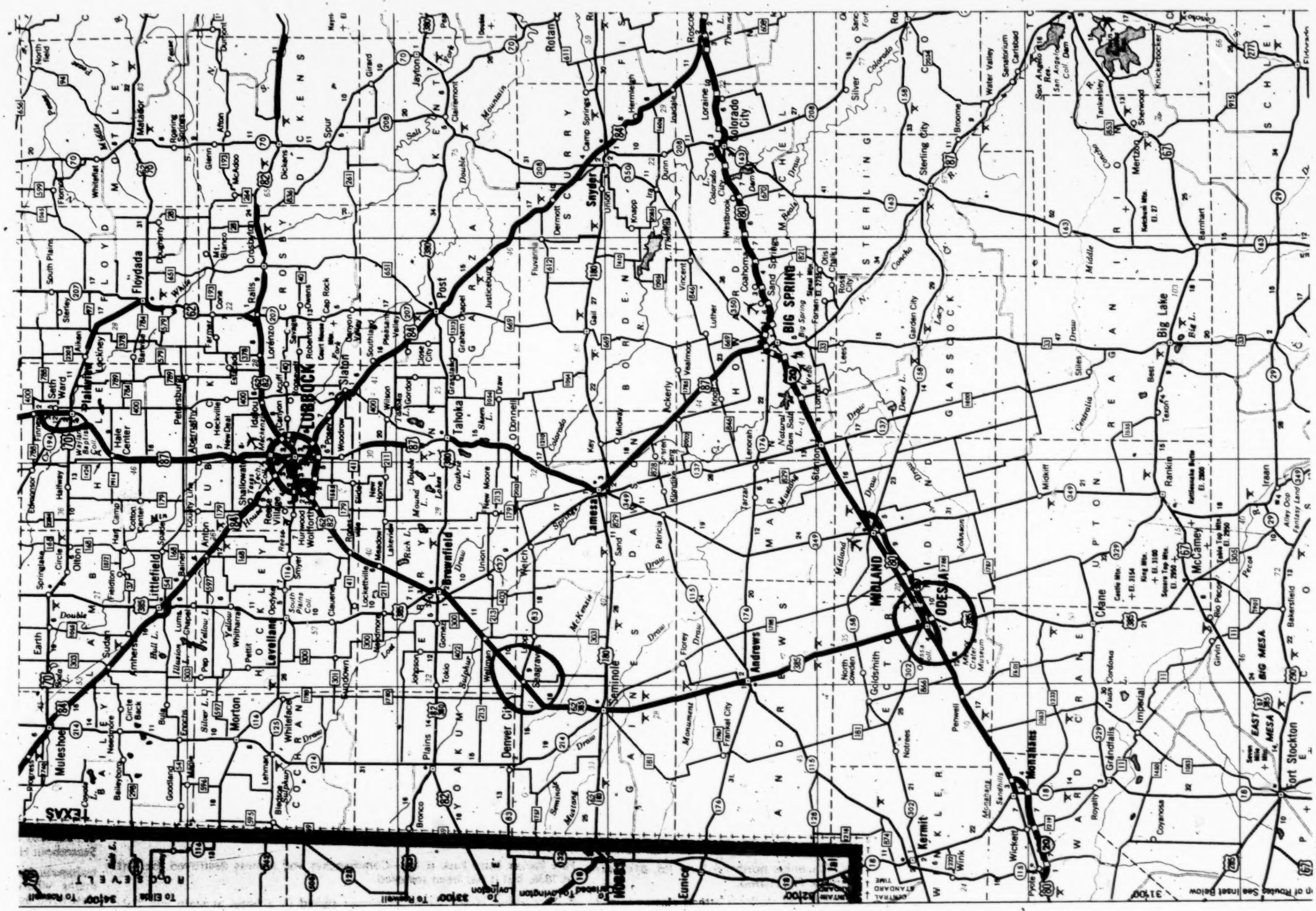




Prepared by Rand McNally & Company, 1968

APPENDIX C

Prepared by Rand McNally & Company, 1968



REME COURT. U. S.

No. 520

SEP 13 1968

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE TEXAS AND PACIFIC RAILWAY COMPANY AND THE TEXAS AND PACIFIC MOTOR TRANSPORT COMPANY,

Plaintiffs-Appellants,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, and PERMIAN BASIN RAILROAD COMPANY,

Defendants-Appellees.

On Appeal From the District Court for the Northern District Of Texas, Dallas Division

APPENDICES 1, 2, 3 AND 4 TO JURISDICTIONAL STATEMENT

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---

APPENDICES 1, 2, 3 AND 4 TO JURISDICTIONAL STATEMENT

APPENDIX 1

REPORT AND ORDER RECOMMENDED BY EDMUND T. FRITZ, HEARING EXAMINER

F. D. No. 22475

By application filed February 21, 1963, the Permian Basin Railroad Co. (applicant) seeks authority under section 1(18)-(20) of the Interstate Commerce Act to

construct and operate a line of railroad extending from a point just within the Odessa, Texas, switching limits of The Texas and Pacific Railway Company, to a point of connection with the Panhandle and Santa Fe Railroad Company just south of Seagraves, Texas. The total number of miles of track proposed to be constructed and operated is 80.35, of which 78.25 miles would be operated as main line and 2.1 miles as spur tracks. All points referred to are in Texas unless otherwise noted.

The Texas and Pacific Railway Company (T&P), The Texas-New Mexico Railway Company, and The Texas and Pacific Motor Transport Company protested the application. Atchison, Topeka and Santa Fe Railway Company, Gulf, Colorado and Santa Fe Railway Company, and Panhandle and Santa Fe Railway Company (Santa Fe) entered an appearance at the opening of hearings, as their interests may appear, but duly changed that appearance during the course of hearings to an appearance in protest to the application. Public hearings have been held and briefs have been filed.

The Applicant

Permian Basin Railroad Co. is a corporation chartered under the laws of Texas on November 23, 1960, and is authorized to operate as a common carrier of property by railroad within the State of Texas. It was organized by businessmen and community leaders in the area when it was decided that the feasibility of constructing a short line railroad should be seriously explored and studies made. The corporation's primary purpose is to construct, own, and operate a short line railroad within Ector, Andrews, and Gaines Counties. The route of the short line would begin at a point on the T&P line approximately

one-half mile east of Odessa, Ector County, thence northerly past the eastern city limits of Andrews, Andrews County, and past the eastern city limits of Seminole, Gaines County, to a point on the Santa Fe railroad line south of the city limits of Seagraves, Gaines County.

Applicant's articles of incorporation provide for an authorized capital stock of 1,000 shares of $100 par value. The stockholders and the board of directors have duly authorized amendment of the charter of the corporation to provide a total authorized capital stock of 50,000 shares of $100 par value, and have duly authorized the issuance of corporate bonds to the extent of $5,000,000, both to be effective if and when a certificate of public convenience and necessity is issued herein. An increase in capital stock is semi-automatic, requiring only a certificate of the Attorney General of Texas before the amendment to the charter is accepted and filed by the Secretary of State.

The applicable law of Texas requires that at least $1,000 of capital stock must be subscribed for each mile of railroad proposed to be constructed. Although the proposed short line would have 80.35 miles of trackage, the incorporators subscribed the full $100,000 authorized issue of capital stock, and 5 percent thereof, or $5,000, was paid into the treasury of the corporation, as required by Texas law.

Pursuant to section 20a of the Act, applicant on July 17, 1961, filed its application for authority to issue the authorized capital stock of Permian Basin Railroad Co. (Finance Docket No. 21688). Applicant was advised by the Commission that such an application for authority to issue securities could not be processed in the absence

of an application under section 1(18) of the Act for authority to construct the railroad line. At that time the corporation had not yet reached a tentative opinion on economic feasibiliy; it would not be in position to file a section 1(18) application within the near future; and the authorizetd capital stock of $100,000 was inadequate to finance construction. For those reasons applicant's board of directors authorized withdrawal of the section 20(a) application. By its Order of November 1, 1961, the Commission dismissed the application without prejudice.

Applicant plans to finance the proposed construction by the issuance of capital stock and first mortgage bonds, as indicated by the authorized amendment to its charter, described above. It expects to market the stock largely to persons and concerns in the area, and to dispose of the bonds through underwriters to financial and investment concerns.

Applicant does not have any measure of control over, or ownership in, any carrier subject to the Act or over the properties of any such carrier; it is not a part of a system or group of corporations or other persons, nor is it controlled by any carrier, system, corporation, or other persons; and it is not connected by stock ownership, or otherwise, with any industry to be served by the line proposed to be constructed and operated.

Since applicant is newly organized and not yet in operation, it has no income account or profit and loss account, and no annual accounts have been filed with the Commission. It was indicated at the hearing that some $40,000 was received on original and assigned stock subscriptions and expended on the studies necessary to support the application herein. There were no outstanding liabilities.

Early in 1962 the incorporators and other interested parties decided that, based upon preliminary surveys of probable traffic, construction of the proposed short line appeared to be economically feasible, and that engineering and other necessary studies should be undertaken. The preliminary traffic studies were based upon information gathered from shippers and prospective shippers by the incorporators and other persons interested in the proposed railroad, without expense to the corporation. In order to finance further technical and detailed studies, the incorporators assigned some of their subscription rights to interested local people willing to purchase those rights to help promote the short line, with the agreement that in the event it could not be constructed or authorized the money paid in to the corporation for the "conditional" assigned subscription right was a "donation"; but that in the event construction was authorized, the assignee subscribers would receive capital stock of the corporation at par value for the amount paid for the assigned subscription right.

Decision To Construct Short Line

Applicant was incorporated by a group of 13 individuals who believe there is a need for a railroad which would serve the present and future transportation requirements of large portions of Ector, Andrews, and Gaines Counties, including the cities of Andrews and Seminole which have no railroad service. Andrews County has no railroad service within the boundaries of the county; Gaines County is served by about 6 miles of the Santa Fe line which enters the county from the north and serves Seagraves; and Ector County is served by the T&P line which extends from El Paso on the west and through Texarkana on the east and which runs northeasterly through the county from its southwest corner, serving

Odessa. The three counties lie in a north-south tier with Gaines County to the north and Ector County to the south. The incorporators believe the proposed railroad freight service would open up new industrial potential for the area and would contribute to the economic stability of the area; and that the short line could be operated at a profit.

The three counties are in one of the most productive parts of the Permian Basin oil and gas fields and in 1959 they produced 5.5 percent of the total United States oil production, principally in Andrews and Ector counties. The area also produces substantial quantities of agricultural produce and livestock, and has satellite businesses and industries.

Andrews County contains 1,504 square miles and Gaines County contains 1,479 square miles, a total of 2,983. As shown by the 1960 census figures in the next succeeding paragraph, those two counties have an average 1960 population per square mile of 8.6, which takes no account of the fact that approximately 75 percent of the population lives in Andrews, Seminole, and Seagraves. Ector County contains 907 square miles with a 1960 population density of 100.3 per square mile and a rural population only density of 11.8, considering the Odessa population as the urban population of the county.

The official 1960 census populations were: Andrews, 11,135; Odessa, 80,338; Seagraves, 2,307; Seminole, 5,737; Andrews County, 13,450; Ector County, 90,995; and Gaines County, 12,267. These figures establish a 1960 urban population of 99,517 and a 1960 non-urban population of 17,195 in the three counties. Of the urban population 82,645 lived in Odessa and Seagraves which have railroad service and 16,872 lived in Andrews and Seminole which do

not have railroad service. Assuming, since the proposed short line cannot serve southern Ector County, that only half of the Ector County non-urban population is now served by railroad (which discounts the 6 mile Santa Fe line to Seagraves) a non-urban area population of 5,328 was served and a non-urban area population of 11,867 was not served by railroad in 1960. Thus, of the total 1960 area population 87,973 inhabitants of the area had available railroad service and 28,739 inhabitants, or approximately 24.6 percent of the total population of the area, did not have such service.

However, the assumption that a non-urban population of 11,867 is not served by a railroad as close and convenient as the proposed short line does not necessarily show the true situation. The Texas-New Mexico (Tex-Mex) Railroad, a T&P subsidiary, operates north and south in New Mexico with 3 stations less than 10 miles from the Texas-New Mexico border, and connects with the T&P main line service to Odessa and to the other main line points served. The nearest Tex-Mex stations are separated from Seminole and Andrews by approximately 30 and 37 highway miles, respectively, so that some of the westerly portions of Andrews and Gaines now have railroad service which is less distant than the proposed short line. The same situation exists in Gaines County with respect to Seminole. A Santa Fe branch line from the north terminates at Lamesa, almost directly east of Seminole. Lamesa (having a 1960 population of 12,438) is approximately 10 miles closer to the common county line than Seminole and the two towns are connected by U.S. Highway 180. A considerable portion of northern Gaines County is closer to Seagraves railhead by highway than to Seminole and is served by an east-west highway into Seagraves.

Andrews and Gaines Counties, and a portion of northern Eetor County, are in the southwest corner of the Panhandle of Texas. The agricultural and industrial development and activity in the Panhandle, and the transportation services available, in the early 1930's are described in *Texas & P. N. Ry. Co. Proposed Construction,* 184 I.C.C. 55, decided April 4, 1932.

Following is a description of railroad transportation in western Texas which, together with the previously described rail lines in and adjacent to the three county area, constitutes the railroad network of presently available rail transportation. Santa Fe System operates more than 1,100 miles of railroad in the Panhandle area including a main line running northeasterly through Amarillo to Kansas City with a connection through Clovis and Roswell, New Mexico, to Pecos; a main line with a connection to Denver, Colorado, and running southeasterly through Amarillo, Lubbock, and Sweetwater on the T&P main line, to the Gulf Coast; and a line from Sweetwater running northerly to connect with the main line to Kansas City. The Chicago, Rock Island and Pacific main line runs east from Tucumcari, New Mexico, through Amarillo, (connecting with the Santa Fe Sweetwater-Kansas City line at Clinton, Oklahoma) and thence continuing east over its System. The T&P main line continues east from Sweetwater through Fort Worth, and Dallas, to Gladewater, at which points it connects with the Missouri-Pacific System. Taking into consideration the interchange points noted above (and there are others not mentioned) it is obvious that the present rail network permits ready access to all major industrial and market centers in the country.

The urban population and businesses of Andrews and Seminole now rely upon a combination rail and highway transportation to receive and ship freight by rail. Seminole is 18 miles from the Santa Fe railhead in Seagraves; 30 miles from the Tex-Mex railhead in Hobbs, New Mexico; 41 miles from the Santa Fe railhead in Lamesa; and 63 miles from the T&P railhead in Odessa. Andrews is 35 miles from the T&P railhead in Odessa; 37 miles from the Tex-Mex railhead in Eunice, New Mexico; and 46 miles from the Santa Fe railhead in Seagraves. All distances are highway mileage over improved all weather highways.

The West Texas oil fields were opened during the 1940's and expanded rapidly during the late 1940's and the 1950's. Exploration and drilling of new wells reached peaks in the three counties in 1956, and again in 1959 when the Permian Basin fields reached an advanced stage of development. The peak of drilling activity in the three county area, as disclosed by the footage of oil wells drilled, was approximately 10 million feet in 1956. After 1959 the drilling activity fell off rapidly to approximately 4.3 million feet of oil wells drilled in 1962. The oil fields are now primarily in the operating stage of producing hydrocarbons and servicing the wells, and in the beginning phase of secondary recovery as the bottom pressure in the wells begins to fall. There have been resultant declines in population, lessening of business activity, and declines in new construction starts principally in housing. Andrews and Ector Counties have the bulk of the oil wells while in Gaines County agriculture is the more important economic factor by reason of intensive development of irrigation wells and extensive use of fertilizers. Principal agricultural products are cattle, pasturage, grain,

cotton and cottonseed, peanuts, and castor beans. Most of the hydrocarbons and agricultural products, or the refined or manufactured end products, are exported from the area.

It is quite clear from the record and from applicant's brief that the primary purpose of the incorporators and other interested persons is to offset the effects of the declining oil and gas exploration and development activity in the three counties and to stablize and expand the economy of the area. With the construction of the short line they expect to attract and promote the development of industry, principally industry which would need and use the oil and gas production locally, such as a petrochemical complex; and to encourage further expansion of the agricultural and livestock potential of the area by making it possible for elevators, processing plants and facilities, and loading facilities to be located on the rail line. Some of the supporting shippers would expect to realize savings in transportation costs from through rail rates to Andrews and Seminole, and savings in highway transportation from Odessa and Seagraves railheads to their business locations in Andrews and Seminole. The latter savings would be a partial savings only because the short line, as now proposed, would be located outside of all city limits. In the absence of spur tracks, which are not now planned, there would still be the same unloading at railhead, unloading at the business locations, and some highway transportation from the short line railheads. The savings would be in the costs of added time (salaries or wages) and expenses (common carrier, drayage, or operational expense of owned equipment) for the saved highway mileage.

Proposed Equipment and Physical Plant

Applicant proposes to operate in freight service only. It will employ 3 diesel electric locomotives which it expects to be able to lease at an annual cost of $28,800. These locomotives would probably be two 1,500 horsepower Baldwin-Lima-Hamilton electric diesel, and one 1,000 horsepower Baldwin-Lima-Hamilton road switching electric diesel, and would be secondhand equipment. Freight destined for points on the line would be transported in cars furnished by the originating line. Applicant would depend upon the connecting carrier to furnish the cars for freight originating on the line. Overhead traffic between T&P and Santa Fe would, of course, present no equipment problem other than locomotive power.

Applicant would construct a shop with a 10 ton crane, machinery, and tools for maintenance and minor repairs to the diesels but would contract all major overhaul and repairs. It would provide miscellaneous road tools for maintenance and repairs of right-of-way, structures, and bridges. There would be modest freight terminal buildings at Odessa, Andrews, Seminole, and Seagraves, with required office space in the Odessa terminal. Communications between the terminals and the trains would be handled over a radio communications system.

The line of railroad would be laid with used ties, used rail, and used accessories, installed with new spikes and bolts and nuts. The main line would be laid with 90 pounds relay rail, and the switching and access tracks with 75 pound relay rail. Necessary culverts, cattle passes, bridges, road crossings, and crossing signals would be constructed and installed.

Motion To Strike

Protestants offered into evidence their exhibit H-61. In June 1963, Arthur D. Little, Inc., was retained by T&P to conduct an independent evaluation of the prospective car load freight traffic and revenues of the proposed short line. Exhibit H-61 is the report of results of that study. The purpose of the investigation was to develop information from which T&P could determine whether there was a sufficient volume of prospective rail freight to justify construction of the proposed new short line. The instructions were that the study should not include traffic originating or terminating in Odessa and Seagraves for shippers and consignees who are located closer to existing rail lines than they would be to the proposed short line and where they could be served more conveniently by protestants' existing trackage than by the proposed short line. The analysis of prospective traffic and revenues was required to and does include the following information: commodities, weight, approximate number of car loads, and estimated revenue of the short line, assuming its independent status and negotiated divisions. After determining the total traffic potential of the short line in terms of current commodity movements in the territory for the base year 1962, the T&P instructions were that the traffic be projected for a five-year period beginning with 1965 as the assumed first full year of operation of the short line. The described instructions were executed in conducting the study and in preparing Exhibit H-61.

Section IV of the exhibit (the title of which is "IV Appendix", the last page of the exhibit) contains the tabulated results of the study for the base year 1962 and tables I through V, both inclusive, contain the tabulated projected results of operation for the years 1965 through

1969, both inclusive. Applicant objected to the admission in evidence of those portions of the exhibit and to testimony in support thereof, which objections were overruled by the hearing examiner. On brief applicant renews its motion, made at the hearing, to strike Section IV and tables I through V of Exhibit H-61, together with testimony relating thereto, on the grounds urged in support of objections to their admission in evidence.

It is contended that there is a failure to comply with the provision of rule 84(b) of the Commissions's General Rules of Practice which requires that "all exhibits showing rates, fares, charges, or other tariff or schedule provisions must, by appropriate Interstate Commerce Commission number reference, indicate the tariff or schedule authority therefor * * *." The portions of the exhibit attacked are the estimated annual revenue for the estimated total prospective annual rail shipments of each commodity. Applicant correctly concedes that this does not constitute a rate exhibit in the sense that it shows the rate from point A to point B to be so many cents per one hundred pounds, but contends that in showing the estimated annual revenues by commodity the exhibit is an exhibit showing "charges" within the meaning of rule 84(b).

The contention ignores the fact that the generic words "rates", "fares", "charges", "tariff", and "schedule" which appear in the rule, as quoted above, are copied from section 6 of the Act. That section relates to the printing, filing, and availability for public inspection of tariffs and schedules, and to other matters related to the establishment of changing of tariffs and schedules, including the extent of the Commission's regulatory authority and jurisdiction in relation thereto. Section 6, in essence, controls and regulates the promulgation and enforcement of

rates, fares, and charges by tariffs and schedules. Section 6(1) clearly indicates the nature of "charges" in providing that "[t]he schedule * * * shall * * * state separately all terminal charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee."

Further light is thrown on the meaning of the word "charges" in the opening sentence of section 6 where it is provided "[t]hat every [regulated railroad] common carrier * * * shall file * * * and print and keep open to public inspection schedules showing all the rates, fares, and charges *for transportation between different points* * * *." (Emphasis supplied.)

It must be concluded, therefore, that under the provisions of section 6 of the Act the term "charges" means those charges made by the carrier against the shipper or consignee for specific services performed during transportation of a shipment of freight other than the rate charged under the appropriate tariff for movement from origin to destination; and that the word "charges" as used in section 6 does not refer to, or include, the total annual revenue earned by the carrier in the transportation of all freight carried during the year, nor of total annual transportation of selected commodities as is the case in exhibit H-61. Since rule 84(b) carefully used the identical terms employed in section 6, the same construction must be applied to the rule. Such construction is in harmony with the maxim *noscitur a sociis* and the more specific maxim *ejusdem generis*, which are well recognized

aids to the construction of words and phrases employed in series.

In making that objection, applicant relied solely upon a failure to comply with rule 84(b). There was no contention that protestants were refusing to produce information necessary to permit applicant to test the validity and accuracy of the projection of probable revenues. Those revenues were based upon rates and tariffs. Protestants had those rates and tariffs, and the citations to the rates used, (in the working papers described in the next discussion of the motion to strike), present in the hearing room and offered them to applicant at the close of direct examination.

It is further contended that the same portions of exhibit H-61, and the testimony in support thereof, were improperly admitted in evidence at the hearing and should now be stricken for failure to accord applicant a full right of cross-examination because the underlying documents were not produced at the hearing. The documents claimed by applicant to be the underlying documents of the exhibit are the survey report forms completed by the interviewer during the initial field survey of freight shippers and receivers.

The estimates of prospective short line freight volume and revenues were based upon the field survey. Prior to the actual field survey the survey team developed lists of companies and individuals in the area, who would be possible shippers and receivers of freight. Those lists were developed from several sources: A separate traffic study of the territory furnished by T&P; a check of telephone directories, of city or county directories, and of Chamber of Commeree listings; the lists of manufacturing

plants in the area, submitted by applicant in its Return to Questionnaire herein; visual inspections of the area and of its industrial and commercial activities; and suggestions furnished by persons contacted in the course of the survey. Those lists were used to contact in person, or by telephone where personal interviews were not possible or practical, a responsible individual in each of the listed firms or shippers.

Among other data, information was obtained on the total car load shipments by all means of transportation, including private trucking, originating or terminating in the area during 1962 and on estimated future prospective shipments into and out of the area.

The survey did not include LCL shipments which were developed separately from an analysis of the 1962 rail and rail trucking subsidiary LCL shipments at Seagraves, on the Santa Fe; at Pecos, and Monahans, on the T & P; and at Lovington, Hobbs, Eunice and Jal, New Mexico, on the Tex-Mex line. The 7 towns are of comparable size to Andrews and Seminole and are in the general region of the proposed short line. The shipments were abstracted from 1962 railroad records and included all originating and terminating LCL shipments whether handled over the rail or in substituted motor carrier service. The population data were taken from the 1960 census. Unweighted averages of annual volume of LCL traffic *per capita* for the 7 towns were 204 pounds *per capita* on inbound shipments and 34 pounds *per capita* on outbound, and a total annual average of 237 pounds per person. These figures were then multiplied by the population of Andrews and Seminole, respectively, to arrive at an estimate of the total LCL revenue freight for the proposed short line. The method used involves the assumptions: (1) that T&P and Santa Fe would continue to transport the LCL freight of Odessa

and Seagraves; and (2) that LCL freight currently handled through Odessa and Seagraves, but originating or terminating in the vicinity of Andrews and Seminole, would be diverted to stations on the proposed short line. The described method was used because almost every type of consumer, including individuals and householders, ships and receives package freight so that a census or sampling procedure did not seem practical; and, even among business concerns, reliable or comprehensive information on LCL freight is not readily available.

For the purpose of the field survey car load shipments were defined as a minimum car load of the commodity. All potential and actual rail shippers were included, both those located within the area and those located elsewhere in the country, so that it was not the more common sampling procedure. Commencing in July, 1963, four persons, each of whom was experienced in the transportation requirements of the industry or business he surveyed, conducted the survey and all used the same reporting form to insure uniformity and comparability of data. The form developed by the team was designed to produce the study required by T&P instructions. It was not a questionnaire form to be filled out by the shipper but was a notetaking report form which was completed by the interviewer.

The survey team developed two data card files: (1) A *survey card* was completed for each shipper and the cards were maintained in alphabetical order under the name of the potentioal shipper; and (2) *classification cards* were prepared and maintained, using the numerical *AAR* (*Association of American Railroads*) code classification of commodities, for freight movements which were deemed to be assured or conditional potential traffic for the proposed short line; and they were maintained in numerical order under the code numbers.

The *survey cards* were prepared from the lists of shippers and from the completed survey reporting forms. Each card shows the names of the potential shipper and, if there were shipments, the commodity, volume, origin, and destination. The *classification cards* were prepared from the survey cards. Each classification card identifies commodities by AAR commodity classification code number, with one or more cards for each code number. This method was used to avoid the confusion that could arise from the varying names often used to describe a single commodity. The survey cards list carload shipments reported in the completed survey report, but the classification cards list only the shipments which, in the judgment of the survey team, would move over the proposed short line. In addition to the data concerning each such shipment, the classification card contains short line revenue for each shipment and, in most cases, the commodity rate and the rate of divisions applied to calculate the short line revenue.

The survey team's *working papers* show the rate and divisions calculations made to arrive at the revenues listed on the classification cards. The rate is identified by tariff, and the division applied is shown as a percentage. In the cases where rates and divisions are not shown on classification cards, they are easily identified by reference to the working papers.

The classification cards are the source of probable short line 1962 freight shipments and revenues set forth in Section IV of Exhibit H-61, and are the foundation from which Tables 1 through V were compiled to project the results of operations of the proposed short line for the years 1965 through 1969.

The survey cards, the classification cards, and the revenue working papers were freely made available to applicant for study and for use in cross-examination. Applicant also had its own shipper questionnaires, traffic survey, traffic volume, and revenue studies upon which to base cross-examination of witnesses supporting protestant's conclusions in exhibit H-61, and to question, shipment by shipment, the results of the survey.

The four man survey team was under the direction of Peter J. Fernald who had final responsibility for the study and report and for all decisions made in planning the survey, during the field survey, and in the evaluation of data obtained. Mr. Fernald submitted most of the oral testimony supporting the report, exhibit H-61. On cross-examination the witness stated that he had in the hearing room the survey reports completed by the team in the field, but he declined to make them available to the applicant on the ground that certain of the information therein was given in confidence with assurance that it would not be disclosed. In general the shippers regard that information as private and confidential competitive material, such as production information which could affect the shipper's competitive position in its industry; information on current business volume and movement; plans for plant expansion; production plans for the future; purchasing, selling, and shipping practices in the area; and the firm's analysis of the economy and business prospects of the area.

Mr. Fernald and another member of the survey team, principally Fernald, were under cross-examination on exhibit H-61 for approximately 20 hours over a period of 5 days of hearing and through some 518 pages of transcript. The questioning was searching, detailed, and explicit. The witnesses' answers were equally detailed and

explicit. The cross-examination was conducted with a minimum of objections, arguments, or interruptions. Methods used and theories employed in making the survey; methods and reasoning employed in evaluating 1962 freight movements to determine the probability of transportation over the proposed short line; and the facts, reasoning, and judgments formed in arriving at projections of short line volume of car load freight and revenues, item by item as questioned in the cross-examination, were disclosed in detail by the witnesses. A few survey reports which contained no confidential material were made available for use in cross-examination.

Applicant did not at the hearing, and does not on brief, question the qualifications of Arthur D. Little, Inc., nor of Mr. Fernald and the other staff members, to conduct the survey and to prepare a report based upon the survey. The organization was founded in 1886 and has since become a highly respected diversified industrial research and consulting firm with a large staff of regularly employed specialists and an extensive staff of consultants having specialized skills. It has broad experience in all forms and aspects of transportation, including economic feasibility, market demand for and availability of rail freight traffic, the economics of freight transportation, rail facilities, and equipment scheduling. Surveys, such as the one conducted in the case, are one of the basic tools and procedures upon which the firm relies in its industrial research. One of the most important phases of any survey is the ability to get full information, including the type of confidential information generally described above. That ability would clearly be impaired for the future if confidences were not respected.

From the above analysis of the survey, the records developed, and the report which became exhibit H-61, it is apparent that applicant was given timely access to all records and facts reasonably required or helpful in cross-examination on the exhibit. All pertinent facts contained in the survey reports were transferred to the survey cards. The judgment process of selecting probable short line traffic was exercised in transferring data from the survey cards to the classification cards. The separate calculations of revenue were made on the working papers. Methods and procedures were described in exhibit H-61 and in testimony. No attack on the exhibit was based upon failure to produce the persons contacted in the survey.

Where adequate records have been produced to support an exhibit, the Commission has refused to require that the precise records demanded be made available for examination. *John Vogel, Inc.—Control and Merger,* 85 M.C.C. 11, 15. Failure to disclose business secrets, such as the volume of a meat packer's traffic, is not a sufficient reason for excluding the results of a survey (of the costs of icing refrigerator rail cars). *Fresh Meats, Transcontinental, Westbound,* 309 I.C.C. 529, 534. It is well settled that administrative agencies are not bound by the strict judicial rules governing the admissibility of evidence. *Sand, Gravel, and Crushed Stone to Southern Illinois,* 160 I.C.C. 507, 514; *Lynchburg Foundary Co.* v. *Atchison, T. & S. F. Ry. Co.,* 279 I.C.C. 171, 175.

Applicant places considerable reliance upon *Powhaten Mining Co.* v. *Ickes,* 118 F. 2d 105. In that case an order of the Bituminous Coal Division of the Department of the Interior was challenged. The involved issue was prices of bituminous coal. Evidence consisted of tabulations of invoices filed with the Department as required by stat-

ute, which also required that the information be held confidential. The tabulation of invoices and coal prices was prepared by code and did not disclose the names of the sellers or purchasers, of coal, nor the character of the individual sales. The court held that failure to disclose the information deprived a cross examiner of ability to test the accuracy, authenticity, and relevancy of the tabulations, and of the ability to determine the real meaning of the cost figures since he could not develop the character of individual sales.

Translating the withheld information in that case into the transportation facts of this case, the names of shippers and receivers of goods and commodities were disclosed; the exact character, purpose, ultimate use, and origin and destination of each shipment were disclosed; and applicant, from its own surveys and studies, had independent information on substantially all of the shippers, receivers, and shipments involved. As discussed above, and as demonstrated clearly by the record, the cross examiner in this case was well able to and did fully test the accuracy, authenticity, relevancy, meaning, and character of probable short line traffic and revenues as shown in Exhibit H-61.

The examiner's rulings on the admissibility of section IV, and of tables I through V of exhibit H-61 were correct and the motion to strike is denied.

The above discussion also establishes that failure to furnish the survey reports does not affect the weight to be given to the exhibit and supporting testimony.

The Protestants

The Texas-New Mexico Railway Company and the Texas and Pacific Motor Transport Company are wholly owned subsidiaries of T&P. Missouri Pacific Railroad Company (Mo-Pac) controls T&P through ownership of approximately four-fifths of its capital stock. Atchison, Topeka and Santa Fe Railway Company is the parent of the Santa Fe Railway System; and Gulf, Colorado and Santa Fe Railway Company, and Panhandle and Santa Fe Railway Company are subsidiaries and parts of that System. Both the Mo-Pac System and the Santa Fe System have been described in published Commission reports. No purpose would be served by further describing them in this proceeding.

T&P operates eastward from El Paso, at which point it connects with Santa Fe System and Southern Pacific; Through Pecos where it connects with Santa Fe System; through Odessa and Midland; through Sweetwater where it connects with Santa Fe; and thence east over its lines and those of the Mo-Pac System. The Tex-Mex service along the New Mexico-Texas boundary line has been described above. That branch line connects with the T&P main line at Monahans less than 40 miles west of Odessa. The Santa Fe System connections at El Paso, Pecos, and Sweetwater all provide service to Lubbock and Slaton. Seagraves is served by the Santa Fe branch line from Lubbock and Lamesa is served by the Santa Fe branch line from Slaton, about 16 miles southeast of Lubbock.

Bridge Traffic

All railroad freight traffic which would be potential overhead traffic for the proposed short line can presently be transported by protestants through the three interchange

points where Santa Fe System connects with the T&P main line. Substantial portions of any traffic originating or terminating in Odessa and terminating or originating at railroad points in the Panhandle; and substantial portions of any traffic originating or terminating in Seagraves and terminating or originating in Odessa or south of Odessa (especially along the Rio Grande River) could be transported over up to 90 and 215 less railroad miles, respectively, in overhead short line traffic. Those differences in mileage would result in somewhat lower rates on freight moving under class rates. The record does not, however, disclose that there is any significant volume of such bridge railroad traffic that would move over the short line. The short line overhead traffic would require two switching operations, one at Odessa and one at Seagraves, instead of only one switching operation at the appropriate interchange point between Santa Fe and T&P. There would also be delays on transfers of freight arriving at or leaving the short line interchange points when the main line arrivals or departures missed connections with the proposed once a day, in each direction, operation of the short line. There would seldom be a substantial short line mileage advantage in other possible short line overhead traffic but there would be the same switching and operating disadvantages in the use of the short line as a bridge line.

Construction Costs

In its Return to Questionnaire applicant estimated the construction cost of the proposed short line, including engineering, contingencies, and interest during construction, at $8,156,615. During the course of the hearings applicant twice revised the estimate to $8,856,600 (exhibit H-13) and to $9,060,788 (exhibit H-53).

T&P retained Wyer, Dick & Co., transportation consultants, to determine the cost of construction of the short line, the cost of operation, and the financial results of operation based upon the traffic survey which has been described above. Since differences in cost of construction estimates were "mainly minor", those studies used the last revised estimate of applicant plus $9,500 as the cost of 3 cabooses, 1 track motor car, 2 track push cars, and a pick-up truck. Those items of equipment were not in the construction cost estimates and were added by applicant at the hearing. Thus the cost of construction and equipment used by protestants are the same as those used by applicant.

There were, however, several criticisms by the witness of items in the estimate. (1) Right-of-way costs were based upon current market value of acreage. The witness was of the opinion that land costs for strips of land for right-of-way would exceed acreage market value, and that 10 per cent should be added for the costs of assembly of the land, such as surveys, title searches, and other acquisition costs. (2) The rail requirement was computed on the basis of the standard 39 foot length. The second hand rail proposed to be used is generally cropped to a 33 foot length before it is put into track and this would increase rail cost since applicant's costs are based upon uncropped rail lengths of 39 feet and more rail would be required than applicant computed. (3) The estimate does not include a cost for raising pole lines. (4) Negotiations with the State of Texas for crossings over highways and with T&P for the overhead crossing over the T&P main line, and the preparation of plans for those crossings, would be time consuming and would likely add to materials transportation costs (to Seagraves instead of Odessa), and to interest costs caused by delays in construction. (5) The relay rail, upon which rail costs were based, was salvage Dudley rail from the Rutland

Railroad which is old rail rolled before cooling processes were used and it is undesirable rail for a short line. Good 90 pound relay rail is difficult to acquire in the quantities required. (6) The diesel locomotives proposed to be leased are excessively high in maintenance costs and they, and others to be found on the secondhand diesel market, are generally discontinued or obsolete types of locomotives which increases parts costs by about 50 percent. The witness estimated that it would add $1,646,000 to the construction costs if applicant were forced to use new track material and a new locomotive. He did not rule out the possibility of finding second-hand material but thought it rather unlikely.

For purposes of this report, 1963 costs of construction and acquisition of equipment will be considered to be approximately $9,070,288, as submitted by applicant and adopted in protestants' studies.

Income Accounts

Both applicant and protestants presented pro forma income accounts for the first 5 years of operation.[1] The nature of such a projection for a proposed short line opened the possibility that the parties would employ different assumptions in determining the volume of revenue freight which the short line could be expected to transport, and they did just that.

Operating Revenues. Applicant made a survey to determine the total inbound and outbound tonnage which had moved into or out of the service area, without regard to the means of transportation by which those commodities moved. The tonnage regarded as unsuitable for railroad

[1] See Appendix A and Appendix D for first year of operation.

movement was eliminated. The remaining tonnage, plus some anticipated overhead traffic, was considered to be traffic susceptible to transportation by rail during the first year of operation and was the tonnage used in computing the anticipated revenues for the first year of short line operations. The results of the revised computations used at the hearings were 731,155 tons, 20,397 car loads, and $1,754,343 in revenues. The operating revenues were estimated at $980,225 in the answer to question 30 in the Return to Questionnaire.

Applicant's estimate of operating expenses for the first year, excluding interest, depreciation other than on road property, and income tax accruals, was $403,093 as shown in the Return to Questionnaire. That estimate also failed to include any cost of hire of freight cars. Two revisions of the estimate were submitted at the hearings, the last of which was $981,665. That estimate included income tax accruals and the hire of freight cars. Each of the estimates was based upon the level of operations expected to be required by the volume of freight used in computing operating revenues.

Protestants' method of estimating LCL shipments on a *per capita* basis has been described beginning on page 11 of this report. That method is found to be reasonably accurate and acceptable. To the extent that applicant exceeded those estimates in including all LCL shipments into the service area (except those regarded as unsuitable for railroad movement) as susceptible to movement by rail, applicant's estimates of tonnage and revenues are overstated. On the other hand, protestants treated the estimated LCL traffic as conditional rather than assured traffic even though the estimates were developed from traffic actually moving by rail in and out of the comparable cities used in the study.

For the first year of operation this conditional LCL revenue was estimated at $25,137.

In protestants' estimates, potential car load traffic was separated into assured shipments and conditional shipments. Assured shipments were defined as traffic that in all probability would move by rail if the short line were constructed and operated in such a way as to provide shippers with a satisfactory level of service. Conditional shipments were defined as shipments that would move by rail if particular conditions were met, such as: One shipper would ship by rail only if a siding were constructed within two miles of his farm, located midway between Seminole and Seagraves; some shipments would require construction of bulk loading and unloading facilities, the cost of which might not be justified after analysis of total transportation costs over alternate routings; and some shipments would depend upon ultimate approval by the Texas Railroad Commission of more favorable intrastate railroad commodity rates. Protestants describe the estimated assured traffic as the minimum level, and inclusion of the estimated conditional traffic as the optimistic level, of rail traffic that might develop for the short line.

Estimates of possible rail traffic developed from the field survey were checked against known data on production, consumption, and shipments from the area, in order to eliminate excessive or duplicative estimates. Where the motor carrier rate in effect was lower than the published rail rate, the possible freight shipment was excluded on the theory that the shipper would select the lower cost motor carrier transportation with its advantages of lower minimum truck load, speed of delivery, and door to door delivery. Where the prospective shipper stated that he would not, or could not, use the rail service if the short line were constructed, that prospective tonnage was excluded.

Potential first year operating revenues were projected by protestants at: Assured traffic 1,275 car loads and $116,778; conditional traffic 1,215 car loads and $112,150; total potential traffic 2,490 car loads and $228,928 in revenue.

In the Return to Questionnaire, applicant projected the operating income for the first 5 years of operation by increasing each year's estimated income 5 percent over that of the preceding year. In its revision of those projections, introduced at the hearings, applicant increased each year's operating income by 5 percent of the projected income for the first year of operation. This was believed to be a reasonable rate of growth for a new railroad furnishing adequate transportation service and making efforts to sell its service to the shipping public.

Operating income projected by protestants for the first 5 years of operation was based upon separate indices developed by the survey team for use in projecting the future movement of major commodities. Employment and population data of Andrews and Gaines Counties were analyzed. The only important export industries in the area were found to be agriculture and production of oil and gas, which generated approximately 70 percent of the prospective rail traffic. The possibility that new basic industries would develop in the area was evaluated. The prospective growth of satellite industries and business was related to that of the basic industries by means of a developed ratio.

Historical growth records and employment records in the basic industries and the total employment in the area were analyzed and future changes were projected. Manufacturing industries in Andrews and Gaines Counties were found to account for only 5.7 percent of total employment

as compared with 27.1 percent in the United States and 16.2 percent in the State of Texas.

Drilling and oil and gas production statistics from 1950 through 1962, both inclusive, were analyzed; estimates of researchers and industry estimates of the long-term rate of growth of demand for petroleum products were studied; and the restrictions imposed by the State of Texas upon the number of oil well producing days per year during the 13 year period were studied and taken into consideration. Since traffic studies were based upon 1962 traffic, that year was used as the index base of 100. Based upon the indicated studies it was protestants' forecast that crude oil production would remain constant on the index at 100 and that the oil well drilling index would vary from 80 in 1965 to 96 in 1969, and would climb back to 100 in 1970.

In order to project protestants' estimate of 1962 prospective agriculture products traffic to the 5 year period 1965 to 1969, the historical as well as the current land uses in Andrews and Gaines Counties were studied. Historically, the land was used primarily for grazing livestock because rainfall averaging only 15-20 inches per year with frequent drought condition made dry land crop farming precarious. The use of ground water for irrigation, with small beginnings early in the century, caused a rapid expansion of agriculture in recent years, particularly in Gaines County. Ground water for irrigation is found in the Ogallala formation or aquifer which lies under the surface of most of Gaines County; and under the northern portion of Andrews County in spotty formations. It is recharged by an undetermined volume of underflow from New Mexico and by rainfall. The latest official estimate (1958) was that the underground water storage was 2.2 million acre feet in Andrews County and 9.6 million acre feet in Gaines

County. The main body of the Ogallala formation is north of Gaines County. The aquifer pinches out in the southwestern part of the county and in northern Andrews County.

From the record it is clear that the ground water is being "mined", that is, that it is being consumed in irrigation and other uses substantially in excess of recharge. A consulting ground water hydrologist testified on behalf of applicant that the probable average future decline in the underground water level at current usage would be approximately 1.3 feet per year. That opinion is supported by official records of measurements of the water level in wells in the area. The number of years within which the recoverable ground water will be exhausted under current use and prospective future increased use for irrigation is debatable because of inadequate information upon which to base an accurate forecast. However, it is clear from the record that there is a more than adequate supply to support forecasts of irrigated agricultural production during the first 5 years of operation of the proposed short line.

Estimating freight revenues from products of agriculture, including livestock, for the first 5 years of short line operation involves an estimate of the volume of production for export and includes imports such as farm mechaniery, fertilizer, and livestock for each of those years. State and federal statistics and projections, principally those of the U.S. Department of Agriculture and of the U.S. Department of Commerce, were used by protestants to project the extent of conversion of pasture land to crop land; the increase in irrigated acreage; the increase in crop yield due to irrigation; the increase in crop yield resulting from adoption of improved technology of production such as deep plowing and the use of fertiliziers; and the cattle and

calf population and sales. In addition the survey crew discussed the agricultural situation and future production plans in Andrews and Gaines Counties with leading farmers, county agents, and the management of local agricultural distribution and processing operations such as compresses, elevators, warehouses, and supply houses. Using 1962 as the index year, the team developed the following index numbers, which show the relative change in value of production and consumption for successive years during the forecast period, for the principal AAR commodities in agricultural import and export of the two counties, and then used those index numbers and the other developed data in projecting the probable short line traffic for the first 5 years of operation.

	1962	1965	1966	1967	1968	1969
Castor Bean Production	100	100	100	100	100	100
Cattle Feed Consumption	100	135	146	158	169	181
Cattle Production	100	123	131	138	146	154
Cotton Production	100	116	121	126	131	136
Farm Equipment Sales	100	100	100	100	100	100
Fertilizer Consumption	100	138	150	162	175	188
Grain Production	100	125	130	135	140	145
Peanut Production	100	162	184	206	229	251
Potato Production	100	200	200	200	200	200
Poultry Production	100	100	100	100	100	100
Seed Consumption	100	100	100	100	100	100

The excess of the index number over the 1962 base index of 100 is the projected percentage increase.

It has already been noted that the survey crew studied and analyzed employment, the total labor force, and the population in Andrews and Gaines Counties. The studies were based upon Texas Employment Commission estimates for the years 1950 through 1962 which were checked against data published in the U.S. Censuses of Population and Manufacturers and against data published by the Population Research Center of the University of Texas. The analysis disclosed that the average rate of employment was 97.2 percent of the total labor force, and that the population averaged 2.71 times the labor force. The analysis established that agriculture (including livestock) and mining (principally oil and gas) accounted for approximately 44 percent of total employment in 1962 as against 51 percent in 1954, and that there will be a continuing slow decline in employment in mining but an increase in employment in agriculture of approximately 26 percent between 1962 through 1970, or approximately 3 percent per year, as a result of increased livestock production and of an increased use of cropland in growing high employment crops such as cotton and sorgum grains. It was also assumed that, as the area develops, community service, transportation, and manufacturing will become an increasingly important part of the economy. Employing those results, the survey team projected employment and population in the two counties, respectively, as follows: *1965,* 9,095 and 25,352; *1966,* 9,295 and 25,921; *1967,* 9,504 and 26,498; *1968,* 9,700 and 27,049; and *1969,* 9,904 and 27,612.

Employment and population growth were selected as the fundamental economic factor for analysis because of the availability and comparability of data. The results were particularly applicable in forecasting future freight volume of import commodities such as those used in the construction industry, in building and repairing roads and

streets, in service businesses, and in both import and export LCL freight, all of which vary in proportion to both total employment and total population. As indicated in the above discussion a governing factor in forecasting future exports and imports of agricultural and mining products was production as influenced by the other factors discussed such as irrigation in agriculture, and production restrictions in oil and gas.

Protestants' estimates of operating expense, like those of applicant, were based upon the projected level of operations required to transport the volume of freight upon which revenues were computed. Based upon the assured traffic for the first year of operation, with revenues of $116,778, protestants estimated operating expenses, tax accruals, and hire of freight cars and locomotives at $339,779, with an operating deficit of $223,001. Based upon the total first year's potential traffic (assured and conditional traffic) protestants estimated operating expenses, tax accruals, and hire of freight cars and locomotives at $415,987, with an operating deficit of $159,037. Neither computation makes any provision for return on the estimated investment of $9,070,288, nor for servicing the proposed $5 million of mortgage debentures which applicant proposes to issue to finance one-half of the investment in plant and operating capital.

Projections of traffic compared. Applicant projected traffic for the first year of operation by including all 1962 freight shipments originating or terminating in Andrews and Gaines Counties without regard to the means of transportation (except for the exclusion of commodities or tonnage regarded as unsuitable for railroad movement); by including bridge traffic where the short line provided a shorter rail route but without regard to whether the high-

way motor carrier route was shorter; and by including projected shipments which were not moving in 1962 such as (1) 250 million pounds of sugar beets for a distance of 195.9 miles producing $307,763 in revenue on a 28.3 percent rate of divisions, and (2) 365 million pounds of iron ore (from Snowflake, Arizona, to Odessa) producing $314,448 of short line revenue on a 10 percent rate of divisions.

Sugar beets were not grown in the area in 1962 and none were shipped from the area that year. In 1963 several test plantings of sugar beets were growing on approximately 200 acres in Gaines County and the beets were to be shipped to a sugar refinerly at Hereford, near Amarillo. Applicant projected that Gaines County would have from 5,000 to 10,000 acres producing sugar beets for shipment to that refinery in 1964. That projection ignores the industry practice of locating a refinery so that the low value beets will move only short mileages from fields to refinery, preferably not over 40 or 50 miles; and disregards the facts that the allotted quota of sugar beets for refineries is established under Chapter 34 of Title 7 of the United States Code by the Secretary of Agriculture, and that the quota for this refinery is alloted in an area some distance north of and not contiguous with Gaines County. There is no other sugar refinery closer to Seminole, nor is there any evidence in the record of a plan to construct one. No reasonable prospect has been demonstrated that sugar beets will be transported during the 5 year period. The projected tonnage is approximately 17 percent of the total, and the revenue is approximately 17 percent of the total.

The iron ore is expected to be produced from 3,300 acres of iron ore deposits in Gila County, Arizona, west of the west boundary line of the Fort Apache Indian Reservation. Iron deposits some 5 to 8 miles distant, and within the

reservation, have been explored by a Colorado mining company, but the results are not disclosed in the record. The 3,300 acres upon which applicant expects to mine iron ore have never been drilled and have only been explored to the extent that iron ore is visible on the surface and in two abandoned tunnels found on the land in which there was exposed iron ore. One of the tunnels had 100 feet of rock over-burden. Geologic formations in the area are known to contain extensive faulting and folding which will complicate mining and increase costs. There is an estimate of reserves of iron ore of about 15.5 million tons but there is no substantial evidence to support such an estimate. No drilling has been done on the land to determine the extent of the deposits of iron ore, the grade of the ore (though a witness stated his opinion that the ore contained 50 percent or more of iron), nor the extent of the rock over-burden.

The Apache Railroad connects with the Santa Fe System at Holbrook, Arizona, and serves Snowflake, Arizona, which is approximately 61 miles from the ore deposits. That railroad is a wholly owned subsidiary of a lumber company. To reach the ore deposit a spur line would need to be construed over rugged terrain ranging from elevation exceeding 5,600 feet near Snowflake to elevation exceeding 5,700 feet near the ore bodies with intervening elevations on a road through the approximate possible route exceeding 7,600 feet. Since no route has been explored or surveyed those elevations are of significance only to illustrate that a 61 mile rail line to the ore deposits would be expensive and difficult to build and maintain. No negotiations have been initiated, even of an exploratory nature, to determine whether such a line would be built.

The iron ore is expected to be processed by a steel mill located on the short line near Odessa. The mill would be

built by a subsidiary of the mining company which controls the ore deposits. The milling company has been incorporated and its stock subscribed in an undisclosed amount but it has no mill sites, and no operating properties either constructed or in the planning stage. It is all prospective. The milling company has in mind using one of several direct-reduction processes but has gone no further than inquire about them without determining whether it could secure a license to use any one of them.

It must be concluded, in view of the time that would be required to promote, construct, and commence operations in both mining and milling, after a spur line construction was a certainty and the ore body proven, that the iron ore traffic must be eliminated from the first 5 years of short line operation.

The iron ore traffic thus eliminated accounts for a total of 25 percent of the projected tonnage and 18 percent of the projected revenues. Total traffic and revenues for the eliminated sugar beets and iron ore accounts for 42 percent of the tonnage and 35 percent of the revenue projected by applicant or, stated another way, that traffic was expected to produce $622,211 of the total first year revenue of $1,754,343.

Applicant projected first year traffic of metallic oil field supplies at 64,870,888 pounds producing revenue of $131,237. Those supplies consist of such items as drilling equipment, pipe, casing, tubing, pumps, and steel rods. The bulk of these supplies are currently transported to well head by truck from inventories maintained in storage yards in the area. There are pipe coating facilities located at Odessa and Hobbs where inventory stockpiles of tubular goods are maintained. Inventories of the various items are seldom maintained by oil companies and

are almost always owned and stockpiled by the steel companies and intermediate suppliers, and each location will service wells within a radius of 100 miles. Applicant expects that inventories would be established on its line, probably at Andrews since it is in the heaviest producing area. It has been shown above that the oil and gas producing areas in Andrews and Gaines Counties are well within a radius of 100 miles of both Odessa and Hobbs. In the event inventories were established and stored at Andrews or Seminole, or both, they would necessarily largely duplicate the presently maintained inventories and would require the construction and operation of a pipe coating facility.

When the steel company or supplier receives an order for oil well supplies it dispatches the ordered supplies from the inventory stockpile to well head and that transportation is necessarily exclusively by motor truck, usually a motor common carrier. Substantially all wells in Andrews and Gaines Counties would be closer by highway to Andrews or Seminole than to Odessa or Hoobs, respectively, which should save the supplier some truck transportation costs. However, the expense of the duplicating inventory or inventories would substantially exceed the savings in trucking costs. It is established that the industry seeks to avoid multiple stockpile inventories because of the costs involved. The principal suppliers and oil company users of the oil field supplies were interviewed by protestants' field survey team and all advised that they would not ship over the proposed short line, and that the savings in trucking costs would be more than offset by added inventory costs. These oil fields are developed so that inventory requirements can be accurately estimated and inventory costs can be controlled.

Applicant projected first year traffic in automobiles, trucks, and parts at a volume of 9,930,040 pounds producing revenues of $77,003. Parts accounted for less than 78,000 pounds and revenues of $949. Parts currently move in less than truck load lots by motor common carrier and would in all probability continue to do so. The current transport pattern of cars and trucks is movement by rail to distribution centers in large cities such as Dallas, and distribution to dealers from those points. Vehicles are loaded at assembly plants from the assembly lines directly on tri-level and bi-level special rail cars; they are removed from those cars by special unloading equipment (each installation costing more than $100,000); and they are then usually delivered to dealers by motor carrier transport truck, but at times by over the highway driving. Since the industry converted to this rail-truck movement from the former generally all truck transport movement, there has been no rail movement of automobiles and trucks into Odessa and Midland which are now served by the T&P main line. The record does not support the premise that cars and trucks would move by rail into the smaller cities of Andrews and Seminole if the short line is constructed and operated.

Applicant projects first year rail transportation of beer from Golden, Colorado, to Odessa with the short line carrying the shipments from Seagraves to destination at Odessa, at a divisions rate of 25 percent. The volume is 23,650,000 pounds and the revenue is $35,475. In 1962 that volume of beer moved to a distributor whose business is located about midway between Midland and Odessa (the distance between the two cities is approximately 20 miles) near the T&P main line and outside of the delivery limits of Odessa. The distributor transported the beer the full 680 miles in his own tractor trailer equipment and, al-

though rail rates on beer from Golden have been reduced, he can save still money by using his own equipment rather than rail transportation. Even if the desired 3 day rail delivery were assured by service over the short line he would continue to use his own 3 day delivery in his own trucks if rail costs were higher than his trucking costs. The record does not establish that the projected beer traffic would move by rail or that it would move over the short line if it did move by rail. In any event, since the business is located beyond the delivery limits of Odessa and the short line could not terminate the traffic, the rate of divisions and the revenues are overstated.

Applicant projected first year grain traffic of 351,889,000 pounds producing revenues of $381,121. Protestants projected potential grain traffic of 51,625,000 pounds producing revenues of $30,519. Grain produced in the area is primarily feed grains such as grain sorghum and milo.

The volume of grain traffic used by applicant assumes that all grain produced in Andrews and Gaines Counties will be transported out of the area by the short line. The assumption is not valid. (1) An elevator operator, handling 45 million pounds of grain annually, was of the opinion that approximately one-half of that grain would move to destination better by rail than by truck, but he would need a spur track to his elevator. (2) A grain dealer exported 15 million pounds by truck in 1962, and used his own equipment to truck between 4.5 million and 6 million pounds of that grain under the federal loan program, which requires rail transportation, to an approved elevator in Lamesa. The 15 million pounds were shown as short line traffic even though the dealer would continue to ship all of his grain by truck if his volume did not justify the cost of a spur line to his elevator loca-

tion. (3) A grain elevator operator transported 5:6 million pounds of grain to Houston in his 2 five axle tractor-trailers and back-hauled fertilizer; and he expects to continue that operation even if the short line is built, although he would like to qualify for storage of additional grain under the federal program. Applicant claimed a first year volume of grain from this dealer of 6 million pounds. In order to qualify under the program he would be required to construct a tunrnout and a one mile spur from the short line to his elevator. (4) The total production of a farmer, who estimated that his irrigated and dry-land acreage produced 2 million pounds of milo, was shown as short line traffic even though his total product is delivered to local elevators which ship the grain and report that shipment in their volume. (5) Two associated elevator companies transported 54.7 million pounds of grain by all means of transportation. Protestants' survey team developed the information that, according to the elevator operators, shipment by rail or truck would depend upon which means of transport was more economical, and estimated that approximately 12 million pounds would probably move by rail. Applicant projected 39.1 million pounds would move by rail. No shipper testimony was presented to support either estimate but the survey team member, who conducted the field interview, testified in support of protestants' estimate of 12 million pounds. (6) the well known rate advantage of exempt commodity haulers over rail transportation, particularly for short haul movements which predominate in applicant's projected grain movements, was given no weight in predicting that all export grain would move by rail. (7) No allowance was made by applicant for duplication in claiming shipments based upon production and also shipments based upon the same grain sold to or stored with local elevators and grain dealers, who are also credited

with the export shipments involved. (8) all grain produced in Andrews and Gaines Counties was considered as traffic regardless of proximity to railheads at Hobbs, Seagraves, Odessa, and Lamesa. It has been demonstrated above that the highway mileage from substantial portions of Andrews and Gaines Counties is shorter to those railheads than highway mileage to the proposed railheads at Andrews and Seminole. (9) The assumption that all grain produced in the two county area will be short line traffic gives no effect to the substantial consumption of feed grain by the local cattle and horse population. (10) It has been noted that the proposed route of the short line will be outside the corporate limits of Andrews and Seminole, and that the applicant does not propose to construct spur lines. As indicated in items (1), (2), and (3) above, shippers would be required to construct costly elevators for storage, or loading facilities, on the line; or would have to construct spur lines to existing facilities before they could ship by rail over the short line. The few prospective shippers who spoke on the subject stated that shipping by rail and construction of necessary facilities would depend upon whether they could save money in rail shipments over truck transportation. (11) The largest single projected shipment of grain was approximately 216 million pounds (of the total of approximately 352 million pounds) credited to "Seminole Chamber of Commerce". The revenue expected to be earned by transportation of that volume of grain to Houston is $240,189 of the total grain revenue of $381,121. As developed in the record, 216 million pounds apparently is the estimated 1962 production of grain in Gaines County, and it is not shown to be excessive. However, any projection that all 216 million pounds will become short line traffic is subject to all of the infirmities noted in this paragraph; and is a duplication of farmers' grain shipments projected from Gaines County.

Applicant projected first year cement traffic of 21,991,252 pounds producing revenues of $16,821. Protestants projected conditional traffic of 12,711,900 pounds producing revenues of $10,257.

Overhead traffic accounts for 11,664,000 pounds and $7,673 in revenues of applicant's estimate. That cement originates at Maryneal on the Sante Fe, south of Sweetwater, and terminates at a bulk storage plant in Brownfield on the Santa Fe, north of Seagraves. Rail movement over existing railroads would be via Santa Fe north to Sweetwater Junction, via Santa Fe northwest to Lubbock, and via Santa Fe southwest to Brownfield. Rail movement using the proposed short line would be via Santa Fe from Maryneal north to Sweetwater, via T&P from Sweetwater southwesterly to Odessa, via short line from Odessa north to Seagraves, via Santa Fe from Seagraves north to Brownfield. This route would be longer and would involve 3 transfers from one railroad to another; and Santa Fe, as the originating and terminating carrier, would transport the cement a shorter distance than either of the other railroads, thus short-hauling Santa Fe at both ends. Sweetwater, Lubbock, and Odessa are the points of what is roughly an equi-lateral triangle except that the short line-Santa Fe route between Odessa and Lubbock is the longer side of the triangle and bulges outward to the west. The Sweetwater-Odessa-Brownfield route would be approximately double the distance of the Sweetwater-Lubbock-Brownfield route. The shipper witness testified that a "portion" of these shipments "could come in" to Brownfield over the proposed short line, but he did not say that any of those shipments *would* be so routed. The above description of the routes strongly indicates the probability that, except in unusual circumstances, those cement shipments would be routed over the Santa Fe in single-line, shortest route shipments.

Applicant projects first year cement traffic of 3,510,632 pounds producing $3,686 in revenues, originating at Odessa and terminating at Andrews. The record establishes that this 1962 traffic originated at a cement plant at Duro approximately 10 miles west of the proposed short line terminus which is east of the Odessa city limits. The explanation given for originating the shipments at Odessa was that the shipper could build cement storage silos and special unloading facilities on the short line so that the shipment could be made by rail, a distance of 35 miles. The only evidence of shipper witnesses, comparing such truck-rail cement transportation between Duro and Andrews with an all truck shipment, is that truck-rail transportation would not be economical and is therefore improbable. Taken into account is the fact that unloading facilities and truck transportation to storage facilities (or construction of on line storage facilities) would be required at Andrews.

Protestants' estimate of cement traffic includes some traffic not considered by applicant, and has been adjusted to probable 1965 traffic while applicant's estimate uses actual 1962 shipments by all means of transportation. Protestants' estimate is accepted as the more accurate, reducing applicant's estimates on cement traffic by 9,279,352 pounds and $6,564 in revenues.

Applicant projected first year sand and gravel traffic of 40,182,730 pounds producing revenues of $16,016. Protestants projected conditional traffic of 28,316,400 pounds producing revenues of $10,327.

One movement of sand consisted of 9,153,730 pounds from Odessa to Seminole producing single-line revenues of $5,309. The 1962 movement upon which that projection was based was, in fact, a movement from Vealmoor to Seminole by truck. Vealmoor is located off-line 20 miles

north of Big Spring which is a T&P station approximately 50 miles northeast of Odessa. While the record is not as clear as it could be on the point, it reasonably appears that the highway mileage from Vealmoor to Seminole is approximately the same as the highway mileage from Vealmoor to Odessa, so that the trucking expense should be about the same. The projected short line movement of approximately 63 miles from Odessa to Seminole, and the unloading and loading expenses at Odessa and Seminole, would be added expenses. There is no support in the record for an assumption that shippers would pay those added costs. Subtracting those revenues from applicant's total estimate leaves $10,707 which is very near the $10,327 in revenues projected as conditional by protestants, a difference of only $380.

Another projected movement of 1,007,000 pounds of crushed stone from Eunice, New Mexico, to Andrews produced revenues of $374 on a 25 percent rate of divisions. The rail mileage between Eunice and Andrews via Tex-Mex, T&P, and the short line is 138 miles, but the highway mileage is only 37 miles. Such a rail movement is highly improbable.

Applicant projected first year cotton traffic at 86,350,000 pounds producing $151,113 in revenues at a 25 percent rate of divisions. Protestants projected 22,140,900 pounds and $68,748 in revenues.

The Statistical Reporting Service of the Department of Agriculture reports the recent total cotton production of Andrews and Gaines Counties to be 69,840 bales in 1959; 57,500 bales in 1960; 84,790 bales in 1961; and 85,150 bales in 1962. Gaines County produced approximately 97.5 percent of those crops. A bale of cotton weighs approximately 500 pounds. The total production in the two counties in

1962 was therefore, approximately 42,575,000 pounds, or less than one-half of applicant's projected first year volume which is based upon 1962 movements by all means of transportation. Cotton from the area moves to Houston for export from Texas. As is the case with grain, much of the cotton is trucked to Houston and the trucker returns with fertilizer as a back haul, and would continue that profitable pattern of movement. Cotton moves from the field to the gin by truck. Three co-operative gins in the area normally truck their cotton to a compress in Lubbock even though there is available rail service from Seagraves. Cotton processed at and near Seagraves, and moving out by rail to Houston, would most likely go by the shorter Santa Fe route through Sweetwater rather than by the longer two-line short line—T&P route through Odessa and Sweetwater. It has been noted above that much of the irrigated agricultural area in Gaines County is nearer to Seagraves by highway than it is to Seminole. Protestants used a larger rate of divisions than applicants, conforming to the industry practice, because of the substantially greater amount of paper work and records required in connection with cotton shipments. The estimates of protestants on cotton traffic appear more realistic than those of applicant.

Applicant's projected traffic and revenues, by commodities, for the first year of operation are shown in appendix A and protestants' similar projections are shown in appendix B. The commodities discussed above were chosen as representative of the difference in approach of the parties to a projection of traffic for the short line; and of the dissimilar theories and methods underlying those projections. Discussion of the remaining commodities would be repetitious and would show only variances of what has already been demonstrated, and will now be briefly summarized.

Applicant included (1) traffic from possible future developments which are not in even a tentative planning stage such as the sugar beet and iron ore traffic; and (2) traffic which would require a radical change in current stockpile inventory, distribution, and transportation patterns in the involved industries, such as motor vehicles and metallic oil field supplies. Those 4 commodities accounted for 47 percent of the volume of traffic and 47 percent of the revenues projected by applicant for the first year of operation. Protestants properly excluded that traffic since there was no demonstrated prospect of such movements in the first 5 years of operation.

Applicant included all traffic moving into or out of the area by all means of transportation which necessarily excludes any future traffic in the area by private, contract, or common carrier motor transportation. Such an assumption cannot be justified either by the record or by past history of the evolution of the transportation industry. Protestants excluded traffic when the shippers or receivers stated it would continue to move by motor transportation; and where comparison of rates, size of shipments, and shipper convenience, such as door to door service and expedited delivery, indicated that motor transportation would be preferred and used by shippers.

Applicant included all shipments which were susceptible to movements over the short line, whether from on-line or off-line points, even though the route was longer than the existing rail route and required two or three transfers between Santa Fe, T&P, and the short line; and included such traffic even though the highway mileage, or the combined rail and highway mileage over existing routes, is much less than the rail mileage via the proposed short line. Protestants excluded such shipments when the mileage differen-

tial was substantial, and especially when the transportation and allied costs were higher or the time in transit was unreasonably increased by reason of mileage and transfers from carrier to carrier.

Applicant mailed questionnaires to producers, shippers, and receivers of freight requesting information on volume, origins, destinations, and other information relating to 1962 freight movements. Most of the questionnaires which were completed were returned to applicant by mail, and, using that information, applicant developed a substantial portion of its projected volume of freight for the first year of operation. Much of the volume so developed was not supported at the hearings by evidence from the involved producers, shippers, or receivers. It is implicit in the method used (and it is established by the record that such occurred) that duplications in reporting would occur when the producers and shippers, or the shippers and receivers each report the same shipment. The questionnaire method used makes it probable (and the record establishes it as a fact) that some included shipments would be unsupportable because the producer, shipper, or receiver has gone out of business (for instance, a cattle shipper) and the record fails to demonstrate that there will be another source to supply an equivalent volume of the commodity. Protestants' procedures and study avoided such duplications and unsupported predictions of the development of new sources in substitution for specific freight which no longer moves in the area.

Applicant gave no weight to the fact that some receivers and shippers would be required to construct grain elevators, cement silos, or other storage and loading or unloading facilities on the short line in order to use the railroad; or would be required to construct spur lines to existing

facilities. Most shipper witnesses with that problem who testified, or who were interviewed by the survey team, stated that they would need to closely examine costs to determine whether there would be such a saving in rail shipment as would warrant the required capital expenditure. Protestants clasified this type of shipment as "conditional traffic".

Other, but more minor, variances between the two methods of projecting traffic have been described and discussed above in connection with specific commodities. Other matters not mentioned would determine whether some traffic would move by rail such as: Securing permission of the Texas Commission to reduce intrastate rates on some commodities; establishment of rates of divisions; and the success of the short line in becoming a party to joint tariffs with the protestants.

As noted on page 18 of this report, and as shown in appendix B, protestants separately projected the volume of assured traffic and the volume of conditional traffic. It appears to be problematical whether all of the conditional traffic would probably move over the short line if it were constructed and operated. However, it is clear that most of it could be short line traffic and the record does not establish that any specific volumes of conditional traffic would not become rail freight traffic.

The examiner finds that applicant's projections of volume of traffic are not supported by the record, and further finds that protestants' projections of the volume of traffic for the first 5 years of operation, as represented by the total of assured traffic and conditional traffic, have been calculated from supportable and reliable data and are reasonable representations of the volume of traffic upon which the short line could and should calculate the results of its first 5 years of operation.

Computation of Revenues. There were some disagreements among the parties relating to applicable rates on certain commodities. Certain of those disputes may be disregarded such as allowances to receivers of oil field pipe for unloading and allowances depending upon the length of the truck haul from the distribution points. The traffic to which those rates would apply has been found to be traffic which the short line would not transport.

Applicant projects that some 38 million pounds will be traffic local to the line. Of that projection 12.7 million pounds of cement and sand, and 14.8 million pounds of metallic oil field supplies have been shown to be improbable traffic, leaving less than one percent of the claimed traffic volume as local to the line. It is, then, apparent that even under applicant's projection substantially all of the short line revenues were projected to accrue from divisions of revenues between the short line and the connecting protestant or protestants which perform part of the rail transportation service. Protestants have projected no traffic originating and terminating on the line. Under the examiner's findings relating to volume of traffic, all revenues will be divisions.

Usually joint rates are established by agreement between the participating railroads, subject to suspension, investigation, hearing, and approval or disapproval by the Commission; with power in the Commission, when it disapproves the proposed joint rates, to fix the precise rates, to fix the maximum or the minimum rates or to fix the maximum and minimum joint rates to be charged. (Section 15 of the Act.) Neither applicant nor protestants urge any substantial difference between their positions as to the applicable joint rates. Their differences relate principally to the rate of divisions of the applicable joint rates.

Divisions of joint rates are also ordinarily fixed by agreement between the participating railroads. (Sections 1(4) and 5(a) of the Act.) As noted in the discussion of specific commodities, some of the proposed transportation would allow the protestant railroads a substantially shorter haul if the short line provided part of the service. Section 15(4) of the Act forbids the Commission to require a railroad, without its consent, to participate in a through route which short hauls that railroad unless the proposed through route is needed "to provide adequate, and more efficient or more economic, transportation". This proceeding is not the proper vehicle for such a determination. Upon complaint or upon its own initiative, and after full hearing, the Commission may prescribe joint rates, and (or) divisions of joint rates which it finds to be just, reasonable, and equitable.

> In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge. (Section 15(6)).

This is not a rate proceeding in any sense of the term, nor has there been a "full hearing" upon the matters which the Commission must consider in prescribing rates or divisions. Under those circumstances the examiner cannot determine that certain precise rates of divisions would be applicable to the projected short line traffic either by agreement between the parties with the approval of the Commission, or by prescription by the Commission. The only determination that could be made here is the maximum and minimum reasonable limits of divisions *for the purpose of evaluating projected revenues* during the first 5 years of short line operation; and nothing herein could have any influence upon later consideration by the Commission of the proper rate of divisions. It should be noted, however, that (with divisions providing substantially all of the revenues of the short line) the revenues from the volume of freight found to be probable during the first 5 years of operation will not "give due consideration * * * to * * * the amount of revenue required to pay * * * a fair return on their railway property held for and used in the service of transportation" nor will those revenues service the proposed issue of debentures. (See page 22 of this report for protestants' computations.) Return on investment and cost of servicing debt have not been computed by the parties and they have not been considered in connection with the pro forma accounts or elsewhere in computing results of operations. The following divisions, expressed in percentages, were used by the parties:

	Applicant	Protestants
1. Texas intrastate, except cotton	25	Various
2. Texas intrastate cotton traffic	25	4[illegible]
3. Southwest territory, other than intrastate	25	20
4. Traffic to and from points west of Kansas City, St. Louis, Memphis and New Orleans gateways	20	20
5. Northeast official territory to and from southwest territory	20	20
6. Transcontinental	10	7.5

Both parties used Texas Lines Division Bases No. 50 (D.B. No. 50) in computing divisions on Texas intrastate traffic, except cotton. Applicant used the applicable base but also used a 25 percent minimum division, which is not provided in D. B. No. 50, in all cases where the base was less than 25 percent. Protestants applied the base without a minimum. Comparisons made with divisions of Tex-Mex and two other railroads in the area disclosed that the lowest divisions paid to them is 25 percent. As has been noted, Tex-Mex is a wholly owned subsidiary of T&P. The bargaining positions of those railroads, and the elements that are to be considered in the prescription of divisions, were not sufficiently explored to warrant a conclusion that the comparison with rates of divisions of other railroads requires a finding that the proposed 25 percent minimum is required here.

The larger divisions used by protestants in connection with cotton traffic have been explained at page 29 of this report.

Applicant's proposed 25 percent division on southwest territory traffic, other than Texas intrastate, is based upon another comparison with the 25 percent rate earned by a railroad in the area, as in the case of Texas intrastate traffic. Protestants point out that the originating line must perform terminal services which are not required in connection with interchanged or through traffic listed above in items 4, 5, and 6. Those services would include switching the car for loading and classification, safety appliance checks, yard checks, preparation of waybills, and recording the car door seals. In view of those added expenses, protestants believe that divisions on this traffic could not exceed divisions in items 4 and 5, as to which applicant and protestant are in agreement on divisions of 20 percent.

Applicant believes 10 percent divisions would be reasonable on transcontinental traffic and argues that since there is "not too much difference" between 7.5 percent and 10 percent, "and as the difference is minor it is manifest the percentage used * * * is not unreasonable". Protestants' projected 7.5 percent division is based upon the opinion of its witnesses, who are experienced management rate men, that a higher percentage would not be supportable based upon industry experience and practice. Excluding iron ore and metallic oil field supplies, the total revenue claimed by applicant on this traffic during the first year of operating is approximately $12,000, which would be reduced by $3,000 if the 7.5 percent rate of divisions were applied, a 25 percent differential which is not a minor difference.

The examiner finds that no precise rate of divisions may be determined to be reasonable herein for application in computing operating revenues; that the probable reasonable maximum rates of divisions for application are those

projected by applicant; and the probable reasonable minimum rates of divisions for application are those projected by protestants.

Effect of short line operations upon revenues of protestants. Operations by the proposed short line would adversely affect revenues of protestants in two instances and improve revenues in another: (1) On those shipments where a shorter rail route would result via the short line, applicant would establish some lower commodity rates per hundred-weight which protestants would meet, thus reducing total revenues even if protestants continued to perform the total transportation; (2) disregarding the probability of some lower short line rates, divisions would divert from the protestants' gross revenues of between 7.5 and 45 percent of revenues now being earned on the diverted shipments, since protestants are now performing the total local transportation (there would be some compensating savings in line haul costs); and (3) operating revenues of protestants would be increased to the extent of divisions earned on new freight shipments originated by applicant.

Wyer, Dick & Co., consultants, analyzed these effects upon the Mo-Pac System, using the total of the assured and conditional short line traffic projections which have been found to be reasonable projections of the volume of traffic applicant could expect to transport. The analysis considers separately the traffic currently being transported by protestants and that portion of the conditional traffic which would be newly generated traffic. The results of that analysis were: T&P would lose revenues on overhead traffic of $19,075 less line haul costs of transportation of $3,497 for a net loss of $15,578 (the savings are based on line haul costs only because T&P would not save any originating and terminating costs on this traffic); (2) T&P

would lose revenues on its current rail traffic which would be diverted to, or originated or terminated by, the short line of $29,355; and (3) T&P and the Mo-Pac System would realize increased revenues of $35,521 on newly generated assured traffic and $63,103 on newly generated conditional traffic for a total of $98,354 increased gross revenue, and a total of $49,177 of increased revenue using the normal 50 percent ratio for costs of handling and transportation. The net gain in revenues is $4,244 but there are offsetting factors.

T&P is now operating two "tricks" or shifts of switch engines at Odessa. The second trick is averaging 3 to 4 hours of daily overtime. The added switching and interchange with the short line at Odessa would require the addition of a third trick switch engine and consequent added costs.

Since applicant proposes to rely upon connecting railroads to supply it with freight cars for originating traffic, the burden of supplying them rests upon protestants. Consultants estimated that if protestants increased their freight car fleet to meet that needed supply to service assured and conditional traffic it would require an investment of approximately $1,391,000. The short line export freight would be substantially all agricultural products (principally coarse grains) and livestock so that the demand for cars would come at times when the demand is high and the available supply is tight.

While it is not realistic to expect that protestants would, in the immediate future, invest exactly $1,391,000 just to meet the short line needs, it is clear that there would be some added investment in and depreciation on equipment used at Odessa and on the short line, and added expense in providing freight cars from sources other than

the Mo-Pac fleet at times when demand is at peak and available supply is low. Taking into account the added switching costs and added costs of supplying rolling stock, the apparent $4,244 net gain in T&P and Mo-Pac operating revenues would actually become a substantial net loss resulting from operation of the proposed short line. A similar analysis of Santa Fe results was not made but it is demonstrated in other evidence and exhibits in the record that the same potential results could be expected. Such other evidence relating to both protestants supports the above analysis of the adverse effect of short line operations upon operating revenues of protestants. It may well be argued that the 50 percent of revenues used to determine costs of transportation beyond the originating line should be used in computing revenues to be lost on overhead traffic. However, conceding the validity of that position, the net loss would be $9,538 instead of $3,497 for an added net gain in revenues of $6,041. The total net gain in revenues to T&P would then be $10,285 which would still support the above conclusion that operations by the short line would adversely affect protestants.

Railroad operating expenses. It has been noted at pages 17 and 22 of this report that applicant and protestants, respectively, computed short line operating expenses based upon the volume of freight and level of operations each projected. For that reason an item by item comparison between the two computations would be of little value. It will be more productive and informative to examine the operations required to handle the prospective traffic; and the assumptions and theories relating to operating personnel, the level of maintenance and repairs, and related costs. Applicant's revised estimates of operating expenses are attached as appendix C, and protestants' estimates of operating revenues and operating expenses are attached as appendix D.

It will be noted that railway operating revenues in appendix D exceed those in appendix B. As stated earlier in this report, appendix B was compiled by the survey team based upon traffic expected to originate or terminate on the short line. Appendix D estimates include the revenues on that traffic as calculated in appendix B, plus overhead traffic developed from protestants' records of 1962 shipments in the area which were transported on protestants' lines. All such traffic was considered to be short line overhead traffic where the short line would provide the shortest route, and the revenues were developed on the probable lower commodity rates and on rates of divisions proposed by protestants. That overhead traffic is a portion of the volume of traffic considered in arriving at the examiners finding on page 32 that protestants' projections of assured and conditional volume of traffic should be the base upon which to compute the results of the first 5 years of short line operation. The pro forma income accounts, computed on the base developed in appendix D, are attached as appendix E.

On brief, in discussing railway operating expenses of wages and salaries, and of depreciation, applicant argues that those items in appendix D and appendix E are estimated as the cost of operating the short line as a separate division of a trunk line railroad operation, whereas wage scales and road property depreciation rates should be computed on the basis that the short line "would be nothing more than an elongated switching operation." Discussion of projected traffic, and the record, establish that the short line would not be a switching operation, but that all switching would be that which is normal in the interchange of traffic between railroads and in the everyday pickup and delivery of freight traffic from shippers and to consignees.

The operation could more properly be considered as comparable to the operation of a branch line.

Railway operating expenses, as reflected in appendix D, are computed upon operations required by the volume of traffic which has been found to be the maximum potential traffic which the short line could develop, and those expenses will be the subject of discussion.

Maintenance of way and equipment maintenance expenses are affected by these facts. (1) The rails will be obsolete Dudley rail, if obtainable, or other 90 pound relay rail. (2) The ties will be second-hand used ties. (3) The used diesel engines which applicant proposes to lease will be models which have been discontinued and which are no longer manufactured. Those 3 items have been discussed in connection with construction costs at pages 16 and 17 above. Item 1 will probably have a minor effect on maintenance of way expense during the first 5 years, though certainly requiring a greater expenditure than would new or more modern rail. Applicant and protestants agree that normal tie replacements will be at the rate of 5 percent annually. Applicant provided for tie replacements of 1 percent for the second, third, and fourth year, and applied the 5 percent rate for the fifth year of operation. Protestants provided for 1 percent the second year and increased each succeeding year by 1 percent until the normal 5 percent replacement rate was reached in the sixth year of operation. Applicant projected a 2 percent annual normal rate of rail replacement and turn-out replacements. Protestants did not provide for any such replacements for the first 5 years of operation. Estimating rates of tie and rail replacement involves judgment factors which are not precise. Total costs resulting from the differing replacement rates adopted by applicant and

protestants are not demonstrated to vary substantially, and the rates used in appendix D are found to be acceptable. Costs of repair and maintenance of the diesel locomotive conform to the prior discussion herein.

The traffic could be handled by a four man train crew operating one train on a turn-around service between Odessa and Seagraves six days a week. A general manager would have jurisdiction over all operations, assisted by a combination train-master mechanic and roadmaster. Four laborers and a foreman would be employed for maintenance of way. A carpenter-mechanic and a mechanic would be employed for locomotive and other maintenance. Two carmen would be required for car inspection and repair, one at Odessa and one at Seagraves. A laborer would be needed to clean and prepare cars for grain, cotton, cattle, and other commodities at Andrews and to help handle L.C.L. freight. One watchman is projected. There would be three station agents, one each at Odessa, Andrews, and Seminole, and one relief station agent required by the 6 days a week operation. There would be a clerk for five months of the year at Seminole primarily to handle the cotton shipments. A one man traffic department could be expected to handle shipper relations and problems. An auditor and 2 clerks would be required to handle the accounting and book work. In order to handle the increased work of installing ties 2 section men were added for the fourth year of operation and 2 were added for the fifth year of operation.

All wages were computed on the basis of standard wage rates currently paid by T&P and the railroad industry. Applicant made local inquiry about the cost of common labor and determined that $1.25 per hour would be the proper wage for section laborers. The prevailing railroad rate of $2.15 per hour was used for section labor in appen-

dix D. Applicant pointed out that in the oil fields roustabout labor is paid $1.35 and $1.40 per hour and that other oil field common laborers in 3 man rig crews are paid $1.50, $1.60, and $2.10 per hour. It is worthy of note here that the $1.25 hourly rate proposed by applicant is the current minimum wage under federal law. The short line employees would soon be aware of the scale of wages and salaries on the T&P and Santa Fe with which their short line would connect. No doubt the minimum wages and salaries proposed by applicant could be approximated at the commencement of operations but only optimism could predict that those wage rates could continue to prevail. Since there are some short lines and switching lines which do not have the labor contracts prevailing on class I railroads, the wage rates have been somewhat overstated for the first year or two of operation.

The employees who will be required to travel to and from work on the line, and otherwise in the line of duty, have been allocated costs of travel, including meals and automobile expenses. Applicant contends it would expect such employees to travel at their own expense, which is not realistic nor probable. Travel expense, including automobile mileage, is a proper operating expense.

Other wages and salaries projected are: Trainmaster, $12,000 per year; auditor, $8,000 per year; traffic manager, $10,000 per year; electrician-machinist-carpenter, $8,200 per year; carmen, $2.73 per hour; and clerks $2.71 and $2.58 per hour. There is no support in the record for a conclusion that annual salaries of officers, supervisory personnel, and the auditor are unreasonable. Assuming that the short line will avoid labor contracts comparable to those of the class I railroads, and further assuming that hourly wage employees can be hired at less than the projected wages described above, the involved items in ap-

pendix D include station service (which includes items other than wages), $44,856; train employees, $46,722; 2 machinists, $16,402; 2 carmen, $13,672; and 2 clerks, $11,045, a total of $132,697. A one-half savings, which would in most instances be at an hourly rate a few cents above the $1.25 minimum wage, would be $66,349. A 25 percent savings, which is more probable, would be $33,175.

Another item attacked by applicant is train fuel expense. Appendix D, item 21 (account No. 2249) is said to be computed on a local market quotation of 13 cents per gallon for diesel fuel. Applicant obtained a quotation on a contract basis of 10¢ per gallon. The total cost in item 21 is $9,491. Recomputing the item from 13 cents to 10 cents per gallon would result in a saving of approximately $730.

Road property depreciation, and other depreciation, are computed under formulas approved by the Commission. Items of expense not specifically discussed are found to be reasonable, and to be supported by the record.

The probable overstatement of operating expenses would reduce the net railway operating deficit to a figure of more than $100,000 for the first year of operation.

Servicing debt. Applicant proposes to market $5,000,000 in debentures or bonds to finance one-half of its construction costs. Substantially the sole security for that issue would be the railroad right of way with its roadbed, trackage and structures. Except for a possible sale as an operating railroad property, investors would be dependent upon the value of the real estate and the salvage value of trackage and structures for their security. Applicant, unlike an operating railroad, has no other security to offer. In those circumstances applicant must expect to pay interest at a rate of not less than 6 percent per year. An

annual interest cost of $300,000, added to an operating deficit of $100,000 or more, demonstrates that applicant would incur an annual overall deficit exceeding $400,000.

Applicant contends that "the question of how the applicant will be financed is not before the Commission in this proceeding, and should play no part in the decision herein", citing *Construction by C., R. I. & P.,* 111 I.C.C. 137, 138-139. It is true that the issuance of securities and a plan of financing cannot be approved or disapproved in a proceeding under section 1 (18)-(20). On the other hand, the pro forma results of operation and the probable financial results of organization, construction, and operation of a new railroad venture are elements which must be taken into account in this proceeding. Costs of servicing debt are, therefore, properly considered. It is also proper to consider the fact that there can be no return to stockholders on their investment.

Public Convenience and Necessity

The factors involved in determining whether present and future public convenience and necessity require the construction and operation of the proposed short line, have been related and discussed throughout this report.

The service area of the proposed short line, and the population of the area, with the distribution between urban and rural population, are described beginning at pages 4 and 21. Railroad service provided in the area by protestants is discussed beginning on pages 6 and 15. Railroad service and its availability is discussed throughout the section on "Projections of traffic compared" commencing on page 22. Industrial and agricultural activities and growth are described beginning on pages 6 and 19. A primary objective of applicant and its supporters to pro-

mote and foster increased agricultural and industrial development is discussed on pages 7 and 22. Current transportation patterns, and the reactions of shippers concerning probable use of the short line, are discussed in connection with the discussion of prospective freight traffic beginning on page 24. The effect of operation of the proposed short line upon existing railroads is discussed beginning on page 35; and the subject of joint rates and divisions, beginning on page 32, discloses future effects which would develop from deficit or marginal short line operations and resulting applications to increase divisions to help produce "a fair return on [short line] railway property held for and used in the service of transportation".

Seagraves and Odessa presently have railroad service. Seminole has rail service 18 miles distant; Andrews has rail service 35 miles distant; and both have additional rail service within 63 and 46 miles, respectively, all points being reached by improved all-weather highways. A substantial portion of the 3 county area is closer by highway to the existing rail service than to the proposed short line railheads of Andrews and Seminole. Substantial and adequate private, contract, and common carrier motor carrier service operates in the area.

While one important purpose of applicant and its supporters is to increase agricultural and industrial development of the area and to promote economic stability, the prospects for any substantial industrial development are best described as hopes for the future rather than as realistic prospects. Agricultural development has proceeded successfully with present transportation facilities. Oil field development has proceeded rapidly past the exploration phase to the development and production stage.

Transportation patterns in the area have been established and conform rather closely to the general industry

patterns with heavy reliance upon motor carrier highway transport. Automobiles, trucks, and oil field supplies distribution patterns would remain unchanged if the short line were constructed and operated.

It is proposed that the short line be constructed outside the city limits of the 4 cities to be served, and that it would not construct spur tracks or industrial tracks. Many prospective shippers would either have to construct spur lines or construct new storage, bulk loading and unloading, processing, or warehousing facilities on line. Most prospective shippers with that problem, who testified, stated that they would have to take a hard look at those costs and at rates, and compare the costs with rail transportation cost savings before deciding whether to use a new short line service. Other costs such as loading and unloading and transportation from railroad to place of business would also influence the decision. Some prospective shippers would use the short line only if more favorable railroad rates were established which would compete favorably with motor carrier costs. Other shipper considerations which would influence the decision to use or not use the short line, and which apply to more specific shipper problems, are set forth in the detailed discussion commencing on page 24 of this report.

General Discussion

The fundamental weakness of applicant's case is the projection of volume of traffic based (1) upon the invalid assumption that all commodities exported from or imported into the area would become short line traffic; and (2) upon the invalid assumption that iron ore and sugar beets would furnish 47 percent of the freight volume and 47 percent of operating income. At best the shipper support shows a need for rail transportation of the total potential

traffic detailed in appendix B. A more realistic and less optimistic view of shipper support indicates a need for rail transportation of the assured traffic and for that portion of the conditional traffic where shipper costs and conditions requirements can be met.

The record does not indicate that substantial savings of transportation expense or time would be realized by shippers, except on some of those commodities listed as assured traffic in appendix B. As to other probable shipments the record indicates shipper doubt that such benefits, or either of them, would be realized.

The record indicates that the required investment would be endangered by substantial deficits resulting from the maximum prospective operations.

The record further demonstrates that operation of the proposed short line would have a detrimental financial effect upon connecting mainline railroads which, while not shown to be too substantial compared to total operating results, would still constitute a burden upon interstate commerce.

Contentions of the parties as to fact or law not specifically discussed herein have been given consideration and found to be without material significance or not justified.

Ultimate Findings and Order

The hearing examiner finds that the present and future public convenience and necessity have not been shown to require the construction and operation by the Permian Basin Railroad Co. of a line of railroad between Odessa and Seagraves, Texas, and that the application should be denied.

Premises considered, it is the ORDER of the hearing examiner that:

The application of the Permian Basin Railroad Co. for a certificate permitting it to construct and operate a line of railroad extending from a point within the Odessa, Texas, switching limits of The Texas and Pacific Railway Company, to a point of connection with the Panhandle and Santa Fe Railroad Company just south of Seagraves, Texas, be, and it is hereby, denied.

The recomemnded order, unless stayed by the filing of exceptions or by the Commission, shall become effective as the order of the Commission on the date of service of a notice or order stating that this recommended order has become the order of the Commission.

/s/ *Edmund T. Fritz*

By the Commission Edmund T. Fritz, Hearing Examiner.

Dated at Washington, D.C., this 2nd day of February A.D. 1966.

H. Neil Garson
Secretary

(SEAL)

APPENDIX A

PROJECTED FIRST YEAR REVENUE (1965) - APPLICANT

Commodity	Weight (Pounds)	Revenue
Agricultural Implements	2,405,127	$5,245.31
Asphalt	1,865,888	1,956.42
Beer	23,650,000	35,475.00
Bentonite	1,200,000	996.00
Building Materials	6,431,271	5,009.68
Cars, Trucks, & Parts	9,930,640	77,002.72
Castor Beans	6,000,000	4,603.50
Cattle	5,348,000	5,632.17
Cattle Feed	1,974,000	2,079.30
Cement	21,991,252	16,821.04
Chemicals	7,013,595	17,040.12
Coarse Grain	351,889,000	381,120.73
Cotton	86,350,000	151,112.50
Cotton Seed	8,565,570	7,317.62
Cottonseed Cake	4,800,000	3,195.24
Diatomaceous Earth	446,000	599.90
Drilling Mud	3,406,080	7,597.20
Electric Appliances	460,000	2,586.89
Fertilizer	61,447,838	71,136.78
Insecticides	1,330,000	6,552.90
Iron Ore	365,000,000	314,447.50
Lumber	8,237,600	10,530.95
Minerals	12,220,000	20,287.55
Newsprint Paper	60,000	102.00
Nursery Stock	200,000	534.00
Oil Field Supplies	64,870,888	131,237.19
Peanuts	243,600	252.51
Petroleum Products	90,032,431	84,252.09
Plumbing	10,217,751	28,793.33
Potatoes	8,500,000	16,151.05
Sand & Gravel	40,182,730	16,016.39
Seeds	100,000	119.76
Sewer Pipe	778,000	1,161.68
Steel	10,073,214	23,541.63
Steel Drums	120,000	360.00
Sugar Beets	250,000,000	307,762.50
Telephone Equipment	110,000	231.51
Telephone Poles	1,738,000	2,755.71
Thread Protectors	70,000	131.24
Volcanic Cinders	4,920,000	1,948.59
TOTALS	1,462,311,865 (or 14,623,119 Cwt.)	$1,754,343.00
Revised operating expense (from Appendix C)		981,665.00
Pro forma net railway operating income		$772,678.00

F. D. No. 22475

APPENDIX B

PROJECTED FIRST YEAR REVENUE (1965)

Commodity	ASSURED TRAFFIC Weight (Cwt)	Approx. Carloads	Revenue	CONDITIONAL TRAFFIC Weight (Cwt)	Approx. Carloads	Revenue	TOTAL POTENTIAL TRAFFIC Weight (Cwt)	Approx. Carloads	Revenue
I. Products of Agriculture									
Grain	351,250	325	$20,606	165,000	153	$ 9,913	516,250	478	$30,519
Cotton	199,268	418	61,873	22,141	46	6,875	221,409	464	68,748
Cottonseed Cake	-	-	-	36,430	41	2,213	36,430	41	2,213
Peanuts	1,895	3	233	-	-	-	1,895	3	233
Seeds	1,266	2	129	-	-	-	1,266	2	129
Castor Beans	-	-	-	21,600	27	1,134	21,600	27	1,134
Litter	620	2	88	-	-	-	620	2	88
Subtotal	(334,299)	(750)	(82,929)	(245,191)	(267)	(20,135)	(799,490)	(1,017)	(103,064)
II. Animals and Products									
Cattle	20,910	104	2,743	-	-	-	20,910	104	2,743
Subtotal	(20,910)	(104)	(2,743)	-	-	-	(20,910)	(104)	(2,743)
III. Products of Mines									
Barytes	12,288	11	1,506	-	-	-	12,288	11	1,506
Bentonite	30,720	54	2,754	25,760	29	2,308	56,480	83	5,062
Diatomaceous Earth	3,680	4	339	-	-	-	3,680	4	339
Sand (Fracturing)	-	-	-	20,000	15	543	20,000	15	543
Sand and Gravel	-	-	-	283,164	218	10,327	283,164	218	10,327
Duramix	1,680	2	46	-	-	-	1,680	2	46
Asphalt	-	-	-	5,355	7	630	5,355	7	630
Sulfur	-	-	-	151,800	115	12,100	151,800	115	12,100
Drilling Mud	1,280	1	310	-	-	-	1,280	1	310
Pozzolan Materials	-	-	-	87,600	74	2,733	87,600	74	2,733
Subtotal	(49,648)	(52)	(4,955)	(573,679)	(458)	(28,641)	623,327	(510)	(33,596)
IV. Products of Forests									
Telephone Poles	21,000	37	2,100	-	-	-	21,000	37	2,100
Lumber, Shingles and Lath	35,933	53	3,428	315	1	41	36,248	54	3,469
Subtotal	(56,933)	(90)	(5,528)	(315)	(1)	(41)	(57,248)	(91)	(5,569)
V. Manufactures and Misc.									
Lube Oils and Grease	24,764	49	2,303	3,360	7	344	28,124	56	2,647
Liquefied Petroleum Gas	-	-	-	69,600	130	8,491	69,600	130	8,491
Alum	1,200	2	223	-	-	-	1,200	2	223
Calcium	2,000	3	323	-	-	-	2,000	3	323
Calcium Carbonate	1,200	2	178	-	-	-	1,200	2	178
Hydrochloric Acid	38,400	47	2,870	-	-	-	38,400	47	2,870
Caustic Soda	3,072	3	522	-	-	-	3,072	3	522
Soda Ash	3,072	3	522	-	-	-	3,072	3	522
Fertilizer	3,450	3	308	141,605	133	12,576	145,055	136	12,884
Peat Moss	-	-	-	567	1	74	567	1	74
Pitch, Lignin	3,072	4	383	-	-	-	3,072	4	383
Wire, Electrical	840	2	232	-	-	-	840	2	232
Pipe and Fittings	-	-	-	821	1	148	821	1	148
Line Pipe	320	1	50	-	-	-	320	1	50
Agricultural Implements	13,578	48	3,007	-	-	-	13,578	48	3,007
Engine Parts	-	-	-	1,000	2	348	1,000	2	348
Drill Collars	14,000	24	2,268	-	-	-	14,000	24	2,268
Tractors & Farm Equip.	11,225	32	2,546	-	-	-	11,225	32	2,546
Cement	-	-	-	127,119	99	10,257	127,119	99	10,257
Brick	-	-	-	34,335	39	2,246	34,335	39	2,246
Sewer Pipe	5,204	9	867	-	-	-	5,204	9	867
Asbestos Cement Pipe	4,095	7	547	3,456	6	1,002	7,551	13	1,549
Woodpulp	3,072	4	287	-	-	-	3,072	4	287
Newsprint	630	1	63	-	-	-	630	1	63
Gypsum Board	1,890	3	223	-	-	-	1,890	3	223
Sheet Rock	9,870	10	840	1,622	2	143	11,492	12	983
Telephone Equipment	1,680	5	459	-	-	-	1,680	5	459
Cotton Patterns	-	-	-	2,431	5	239	2,431	5	259
Burlap Bags	-	-	-	1,000	2	232	1,000	2	238
Starch	6,144	10	994	-	-	-	6,144	10	994
Animal Feed	-	-	-	29,565	57	1,732	29,565	57	1,732
Metal Containers	490	3	138	-	-	-	490	3	138
Cardboard Cartons, KD	-	-	-	2,000	5	344	2,000	5	344
Scrap Metal	3,200	4	270	-	-	-	3,200	4	270
Subtotal	(136,668)	(279)	(20,623)	(418,481)	(489)	(38,196)	(555,149)	(768)	(58,819)
Total Carloads	838,238	1,275	116,778	1,237,666	1,215	87,013	2,075,924	2,490	203,791
LCL	-	-	-	41,986	-	25,137	41,986	-	25,137
GRAND TOTAL	838,238		116,778	1,279,652		112,150	2,117,910		228,928

NOTE: ( ) denotes deficit.

F. D. No. 22475

APPENDIX C

PERMIAN BASIN RAILROAD OPERATING EXPENSES

Name of railway operating expense account	Estimate of operating expenses for one year		
	Original	Added	New Estimate
MAINTENANCE OF WAY AND STRUCTURES			
(2201) Superintendence	$ 5,000.	$ 0	$ 5,000.
(2202) Roadway Maintenance	10,400.	23,208.	33,608.
(2203.1) Maintenance, Bldgs. Fixtures & Grounds, Labor	1,440.	0	1,440.
(2203.2) Maintenance, Bldgs, Fixtures & Grounds, Material	374.	0	374.
(2208) Road Property Depreciation	36,812.	0	36,812.
(2209.1) Other Maintenance of Way Expense, Mch. & Tools	696.	0	696.
(2209.2) Other Maintenance of Way Expense, Auto Equipt.	1,000.	1,000.	2,000.
(2209.3) Other Maintenance of Way Expense, Misc.	4,785.	1,317.	6,102.
Total Maintenance of way and structures	$ 60,507.	25,525.	$ 86,032.
MAINTENANCE OF EQUIPMENT			
(2221) Superintendence	$ 5,000.	0	5,000.
(2222) Shop & Misc Equipment Maintenance	213.	0	213.
(2223) Shop & Power Plant Mchy - Depreciation	1,420.	0	1,420.
(2225.1) Locomotive Maintenance, Labor	6,789.	0	6,789.
(2225.2) Locomotive Maintenance, Material	2,292.	0	2,292.
(2225.3) Locomotive Maintenance, Outside Labor	696.	0	696.
(2225.4) Locomotive Maintenance, Outside Material	114.	0	114.
(2226.1) Car Repairs, Labor	17,680.	0	17,680.
(2226.2) Car Repairs, Material	703.	0	703.
(2227) Other Equipment Repairs	120.	0	120.
(2235) Other Equipment Expense	1,906.	0	1,906.
	$ 36,933.	0	$ 36,933.
TRAFFIC			
(2240) Traffic Expenses	$ 17,608.	0	$ 17,608
TRANSPORTATION - RAIL LINE			
(2241) Superintendence & Dispatching	$ 18,110.	0	$ 18,110.
(2242) Station Service	25,308.	10,198.	35,506.
(2248) Train Employees	93,082.	14,376.	107,458.
(2249) Train Fuel	13,283.	14,067.	27,350.
(2251) Other Train Expenses	4,049.	0	4,049.
(2253) Loss and Damage	0	5,965.	5,965.
(2255) Other Rail Transportation Expense	4,758.	40,206.	44,964.
Total Transportation Rail Line	$ 158,590.	84,812.	$243,402.
GENERAL			
(2261) Administration	$ 56,801.	0	$ 56,801.
(2262) Insurance	10,904.	19,884.	30,788.
(2264) Other General Expenses	3,789.	0	3,789.
Total General Expenses	$ 71,494.	19,884.	$ 91,378.
RENT			
Rent of Locomotives	$ 28,800.	0	$ 28,800.

APPENDIX C — F. D. No. 22475

	Original	Added	New Estimate
TAX ACCRUALS			
United States Taxes			
Retirement Tax	$ 12,055.	1,842.	$ 13,897.
Unemployment Tax	6,147.	992.	7,139.
Income Tax	398,967.	(89,767.)	309,200.
Other than United States Taxes	17,822.	0	17,822.
	$ 434,991.	(86,933.)	348,058.
MISCELLANEOUS EXPENDITURES			
(536)—Hire of Freight Cars—Debit Balance	$ 86,431.	43,023.	129,454.

RECAPITULATION

Maintenance of Way & Structures	$ 86,032.
Maintenance of Equipment	36,933.
Traffic Expense	17,608.
Transportation — Rail Line	243,402.
General Expenses	91,378.
Rent	28,800.
Tax Accruals	348,058.
Miscellaneous Expenditures	129,454.
GRAND TOTAL RAILWAY OPERATING EXPENSES	$ 981,665.

APPENDIX D — F. D. No. 22475

PERMIAN BASIN RAILROAD CO.

Pro Forma Income Account For First Year Based Upon Estimated Total Potential Traffic

Line No.		
1.	*Total Railway Operating Revenues*	$ 256,950
	Railway Operating Expenses	
	Maintenance of Way and Structures	
2.	2201—Superintendence	3,360
3.	2202—Roadway maintenance	32,128
4.	2203—Maintaining structures	2,768
5.	2208—Road property—Depreciation	48,238
6.	2209—Other M of W expenses	9,095
7.	Total	$ 95,589
	Maintenance of Equipment	
8.	2221—Superintendence	$ 2,240
9.	2222—Repairs to shop machinery	213
10.	2223—Shop machinery—Depreciation	726
11.	2225—Locomotive repairs	14,320
12.	2226—Car repairs	14,049
13.	2227—Other equipment repairs	80
14.	2234—Equipment Depreciation	328
15.	2235—Other equipment expenses	1,957
16.	Total	$ 33,913
	Traffic	
17.	2240—Traffic expenses	$ 21,747

	Transportation	
18.	2241—Superintendence	$ 5,600
19.	2242—Station service	44,856
20.	2248—Train employees	46,722
21.	2249—Train fuel	9,491
22.	2251—Other train expenses	6,493
23.	2253—Loss and damage	2,570
24.	2254—Other casualty expenses	880
25.	2255—Other rail transportation expense	9,449
26.	Total	$ 126,061
	General	
27.	2261—Administration	$ 46,645
28.	2262—Insurance	18,146
29.	2264—Other general expenses	2,775
30.	Total	$ 67,566
31.	Total Railway Operating Expenses	$ 344,876
32.	*Net Revenue from Railway Operations*	($ 87,926)
	Railway Tax Accruals	
33.	Payroll	$ 16,001
34.	Federal Income Tax	—
35.	Other	17,822
36.	Total	$ 33,823
37.	*Railway Operating Income*	($ 121,749)
	Rents Payable	
38.	Hire of freight cars	$ 27,688
39.	Hire of locomotives	9,600

40.	Total	$ 37,288
41.	*Net Railway Operating Income*	($ 159,037)
42.	*Income Available for Fixed Charges*	($ 159,037)
43.	*Estimated Investment*	$9,070,288
44.	*Per Cent Return on Investment*	—

Note: ( ) = Deficit

APPENDIX E

PERMIAN BASIN RAILROAD CO.

Pro Forma Income Accounts For First Five Years

Based Upon Estimated Total Potential Traffic

Line No.		YEARS 1st	2nd	3rd	4th	5th
1.	Total Railway Operating Revenues	$ 256,950	$ 266,011	$ 274,583	$ 282,859	$ 291,666
2.	Railway Operating Expenses	344,876	356,288	371,528	391,699	411,954
3.	Net Revenue from Railway Operations	($ 87,926)	($ 90,277)	($ 96,945)	($ 108,840)	($ 120,288)
	Railway Tax Accruals					
4.	Payroll	$ 16,001	$ 16,001	$ 16,439	$ 17,411	$ 18,335
5.	Federal Income Taxes	-	-	-	-	-
6.	Other	17,822	17,822	17,822	17,822	17,822
7.	Total Tax Accruals	$ 33,823	$ 33,823	$ 34,261	$ 35,233	$ 36,157
8.	Railway Operating Income	($ 121,749)	($ 124,100)	($ 131,206)	($ 144,073)	($ 156,445)
	Rents Payable					
9.	Hire of Freight Cars	$ 27,688	$ 28,646	$ 29,571	$ 30,432	$ 31,382
10.	Hire of Locomotives	9,600	9,600	9,600	9,600	9,600
11.	Total Rents Payable	$ 37,288	$ 38,246	$ 39,171	$ 40,032	$ 40,982
12.	Net Railway Operating Income	($ 159,037)	($ 162,346)	($ 170,377)	($ 184,105)	($ 197,427)
13.	Income Available for Fixed Charges	($ 159,037)	($ 162,346)	($ 170,377)	($ 184,105)	($ 197,427)
14.	Estimated Investment	$9,070,288	$9,095,288	$9,120,288	$9,145,288	$9,170,288
15.	Per Cent Return on Investment	-	-	-	-	-

NOTE: ( ) = Deficit.

APPENDIX 2

REPORT OF THE INTERSTATE COMMERCE COMMISSION

BY THE COMMISSION:

Exceptions were filed to the report and recommended order of the examiner and protestants replied. Our conclusions differ from those of the examiner. Exceptions and findings not specifically discussed herein nor reflected in our findings or conclusions have been considered and found not justified.

The Permian Basin Railroad Company, a corporation chartered for the purpose of operating as a common carrier by railroad under the provisions of part I of the Interstate Commerce Act, applied on February 21, 1963, for authority under Section 1(18)-(20) of the Act to construct and operate a line of railroad extending from a point just within the Odessa, Tex., switching limits of The Texas and Pacific Railway Company (T&P) to a point of connection with the Panhandle and Santa Fe Railroad Company just south of Seagraves, Tex., a line of approximately 78.25 miles, and 2.1 miles of spur track.

A protest was filed jointly by T&P and its subsidiary, The Texas and Pacific Motor Transport Company. A hearing was held at which The Atchison, Topeka and Santa Fe Railway Company appeared with several of its subsidiaries, all of which are referred to herein as Santa Fe. Goodpasture Grain & Milling, Inc., of Lubcock, Tex., appeared in support of the application.

We have recalled the proceeding from the Finance Review Board for decision. Oral argument has been requested

by the applicant, but we do not believe it necessary for a proper disposition of the issues. The request, therefore, is denied.

The applicant filed voluminous exceptions to statements of fact, conclusions and rulings in the examiner's report. We have reviewed the testimony and the numerous exhibits compiled in this extensive record and have fully considered the views of all parties.

The applicant was chartered in Texas on November 23, 1960, by 13 individuals to construct and operate a railroad for service in three Texas counties—Ector, Andrews, and Gaines, located in and near the "Southern High Plains" area at the southwest corner of the Texas Panhandle. Its articles of incorporation authorize the issuance of 1,000 shares of capital stock with a par value of $100 per share; and the incorporators have subscribed the full amount. The stockholders and board of directors have authorized, in addition, (1) a charter amendment increasing the number of shares to 50,000 of the same par value and (2) the issuance of corporate bonds to the extent of $5,000,000. Both amendments are to become effective—almost automatically—when and if construction of the line is authorized by us. Five percent of the subscribed amount ($5,000) has been paid into the applicant's treasury as required by Texas law. This is one-tenth of one percent of the stock authorized by the prospective charter amendment. In order to finance certain studies in connection with the proposed construction the incorporators have assigned some of their subscription rights to interested local people with the agreement that if the line is not constructed the money paid for the assigned rights is a donation, but that if construction is authorized, the assignees would receive capital stock in the applicant at par value for the amounts paid.

The line would be operated in freight service only. The applicant intends to lease three diesel electric locomotives at a total annual cost of $28,800 and to rely on connecting lines and shippers for cars. It would construct a shop for maintenance and minor repair of locomotives and would contract out major overhauls and repairs. The main line would consist of 90-pound relay rail to be installed on used ties with new spikes, bolts and nuts, while switching and access tracks would be laid with 75-pound relay rail. The examiner found the cost of construction and equipment as of 1963 to be $9,070,288. This is the amount estimated by the applicant and used by the protestants in their studies, and we shall proceed on the basis of that estimate as well.

Of the three counties for which the applicant is chartered, Andrews County has no railroad within its boundaries, Gaines County is served by about six miles of Santa Fe line in its north-central portion and Ector County is served by T&P which bisects the county from southwest to northeast. The principal communities to be served include two which now have no rail service—Andrews, population 11,135, in Andrews County; and Seminole, population 5,737, in Gaines County; and two others which do have rail service—Odessa, population 80,338, on the T&P in Ector County; and Seagraves, population 2,307, on the Santa Fe in Gaines County. The hearing examiner found that in 1960 the urban population of the three counties totaled 99,517, and nonurban, 17,195. Of the urban population, 82,645 lived in Odessa and Seagraves which have rail service and 16,645 lived in Odessa and Seagraves which have rail service and 16,872 lived in Andrews and Seminole without rail service. Of the nonurban population 5,328 were served by rail and 11,867 were not.

Although the applicant would introduce direct rail service into Andrews County and parts of Gaines and Ector Counties, some areas of all three counties would still be closer to existing rail facilities at Seagraves and Odessa and railheads in adjoining counties.

The three counties lie in one of the most productive parts of the Permian Basin oil and gas fields which in 1959 accounted for 5.5 percent of the total national production. The peak of drilling activity has fallen off and the oil fields are now in the operating stage or in the beginning phase of secondary recovery as bottom pressure begins to fall. The bulk of the oil wells are in Andrews and Ector Counties.

In Gaines County, agriculture is highly developed and is the most important economic factor because of intensive drilling of irrigation wells and extensive use of fertilizer. The main farm products are cattle, pasturage, grain, cotton and cottonseed, peanuts and castor beans.

Most of the oil field and farm products are shipped out of the area by both rail and highway. For rail transportation Andrews and Seminole must rely upon highway connections with railheads. Seminole is 18 miles by improved all-weather highway from the Santa Fe at Seagraves, 30 miles from the T&P at Hobbs, N. Mex., 41 miles from the Santa Fe at Lamesa, and 63 miles from the T&P at Odessa. Andrews is 35 miles from Odessa, 37 miles from the T&P at Eunice, N. Mex., and 46 miles from Seagraves.

The applicants and protestants differ widely in their financial estimates of the line's operation. The applicant considered as available to it, all the territory's traffic susceptible of rail transportation regardless of the means by which it has been moving into or out of the area. To that it

added some overhead traffic. And on that basis it anticipates from the first year of operation revenues of $1,516,343, operating expenses of $981,665 and railway operating income of $534,623. For the second through fifth years of operation, it forecasts income increased by five percent each year over the preceding year. The first year revenue estimate is detailed by commodity in Appendix A.[1]

The protestants estimate that the applicant's first year of operation (assumed to be 1965) would produce a net loss of $159,037 in railway operating income, with annual losses increasing to $197,427 by the fifth year.

Protestants argue that the divisions which the applicant would receive on joint-line traffic (based on either the applicant's or the protestants' estimates) would substantially exceed the new railroad's contribution to transporting such traffic, and the overall result would be a reduction in the revenues of existing carriers. They contend that the line will not generate sufficient traffic and revenues to permit the applicant to stay in business without continuously pressing for higher divisions from its connecting railroads. They contend that financially weak carriers prolong life by holding back on payment of joint revenues to connecting lines, becoming current with the latter only alternately on per diem charges, divisions, or freight losses and damages. It would be better, they urge, that the line not be constructed than that they be required to withstand the derelictions of a dying short line over a long period of time.

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[1] On exceptions, the applicant acknowledges a computational error and a tariff change which made necessary a reduction of anticipated revenues on cars, trucks, and parts from $77,003 to $42,000, and on sugar beets from $307,763 to $104,710. Appendix A therefore differs from the corresponding appendix A of the examiner's report.

The protestants' estimate of the proposed line's first year of operation is attached as Appendix B. It is listed by commodities under three headings of potential traffic. The first category represents traffic the protestants' survey teams found would probably be handled by the line. This traffic, designated "assured," is estimated at 1,275 carloads of various commodities producing $116,778 in revenues.

The second category, designated "conditional," represents traffic which might be handled on the line provided certain conditions respecting availability of traffic, service, costs, etc., are met. It consists of 1,215 carloads of commodities, some not included in the "assured" category, producing $87,013 in revenues.

The third category, designated "total potential," is the aggregate of the first two, or $228,928. The total potential traffic listed in Appendix B differs from the total potential traffic shown by protestants in an exhibit listed as Appendix D in the examiner's report. In that exhibit, protestants show total railway operating revenues of $256,950.

The examiner found the applicant's case weak in its projection of traffic volume based on the assumption that all commodities moving from or to the area would become traffic for the line and that iron ore and sugar beets, neither of which are now shipped to or from the area, would furnish 42 percent of freight volume and operating income. He further found that at best the record shows a need for rail transportation of the "total potential traffic" set out in Appendix B; and that, more realistically, the record indicates a need for rail transportation of the "assured" traffic in Appendix B and for a portion of the conditional traffic where shipper conditions can be met. He saw no indication in the record that substantial savings of trans-

portation expense or time would be realized by shippers except on some of the "assured" traffic. He concluded that the operating deficit for the first year of operation would be more than $100,000. Other findings were that the required investment would be endangered by the substantial deficits resulting from the proposed operation; and that operation of the line would have a detrimental financial effect upon connecting mainline railroads, which, although not large by comparison with total operating results, would still constitute a burden upon interstate commerce. He recommended, therefore, the application should be denied.

The applicant, on exceptions, challenges the validity of the protestants' exhibits and testimony, and questions the qualifications of members of the protestants' survey team and the quality of the data they compiled. It disputes in detail the examiner's findings concerning potential rail traffic in the involved area. Applicant also takes issue with the examiner's finding that, because two switching operations would be required (one at Odessa and the other at Seagraves), no significant volume of bridge traffic would move over the line; that the burden of supplying cars for use on the new line would rest upon protestants; and that the area already has adequate rail service. It contends that the examiner erred in accepting the protestants' criticism of its construction-cost estimate. As mentioned earlier, the examiner adopted the applicant's estimates.

The examiner denied a motion by the applicant to exclude the protestants' exhibits from which Appendix B was compiled and the testimony given in connection therewith. The applicant excepts to the ruling on two grounds: (1) that the estimated revenues listed by commodity constitute, in effect a showing of "charges" within the meaning of rule 1.84(b) of the Commission's General Rules of Practice,

and, therefor, the exhibits do not comply with that rule in that they do not indicate the tariff or schedule authority for the charges upon which the projected annual revenues are based, and (2) that the protestants refused to permit inspection of the survey report forms, completed from information furnished by shippers and receivers, from which the exhibits are constructed. As to the latter, the protestants explained that the forms contain confidential material which the survey team had assured its sources would not be released for public use.

Rule 1.84(b) of the Commission's General Rules of Practice provides:

> (b) *Reference to tariff authority, routes, and distances.* All exhibits showing rates, fares, charges, or other tariff or schedule provisions must, by appropriate Interstate Commerce Commission number reference, indicate the tariff or schedule authority therefor, and if distances are shown must also show the authority therefor and, by line, highways, or waterways, and junction points, the routes over which the distances are computed; except that the routes over which the distances are computed need not be shown when such distances are specifically published in a tariff or schedule lawfully on file with the Commission, or definitely ascertainable from a tariff or schedule on file with the Commission showing rates prescribed by the Commission and based on short-line distances, or short-highway distances, provided the exhibit makes specific reference to such tariff or schedules as provided by this section.

The rule explicitly limits its application to exhibits showing "rates, fares, charges, or other tariff or schedule provisions." Applying the legal maxim that a word is or may

be known from the accompanying words, the words "or other tariff or schedule provisions" make it clear that the preceding word "charges" means charges which are tariff or schedule provisions. The exhibits in question neither show nor purport to show tariff provisions, and consequently the rule does not apply to them.

The exhibits here in question purport to show the estimates of expert witnesses as to prospective annual revenues. The work papers upon which the estimates were predicated (including tariff citations) were available in the hearing room, but the applicant, relying solely on a technical rule of evidence, chose neither to examine them nor cross-examine the expert witnesses about them. Nor does it contend that the protestants refused to produce any tariff reference on which to test the accuracy and validity of the revenue estimates.

We agree with the examiner's finding that the protestants' exhibits are adequately documented, which fact, together with the 20 hour cross-examination over a period of 5 days of hearing to which principal members of the protestants' survey team were subjected, amply establishes their admissibility. The examiner's denial of applicant's motion to strike is affirmed and the disputed exhibits are admitted in evidence.

Among the matters to be considered in deciding an application for authority to construct a line are the anticipated earnings therefrom. See *Mound City & E. Ry. Co. Securities,* 166 I.C.C. 123, 127. The applicant estimated that $318,448 (18 percent of its revenues and 25 percent of its traffic) would be derived from the movement of iron ore. The prospective mining area is on the Colorado Pleateau south of the Painted Desert, in Gila County, Ariz., about 750 miles from Odessa. This ore would have to be moved

east from that area for a distance of 38 miles to the 18-mile spur said to be maintained by a lumber company, thence to Snowflake, Ariz. The ore would then be moved via the lumber company's railroad (Apache Railroad) for 25 miles to Holbrook, Ariz.; from that point via Santa Fe for 589 miles to Seagraves; and then via the applicant for delivery to a proposed direct-reduction steel mill near Odessa. The total distance would be about 75 to 100 miles less than the Santa-Fe-T&P route via Sweetwater.

The Gila County ore area has not been explored as to the extent of its iron deposits. It has not been determined whether the prospective shipper's leasehold contains any deposits of iron ore in commercial quantities. There is at present no rail link between the mining area and the Snowflake spur. Construction of such a link would necessitate Apache Railroad's obtaining permission to build a spur line through a national park across mountainous terrain at elevations ranging to 7,600 feet. It has no present plans for building such a spur. The steel mill would be owned and operated by a corporate subsidiary of the company which has the mineral rights. The milling company is not presently in operation. In fact, it is merely in the formative stage of its incorporation. It has conducted no negotiations for the use of any of the various direct-reduction processes with the patent owners. The establishment of a mill in the Odessa area is also contingent upon locating a suitable site at a price the new enterprise can afford. All the land shown the company representative was priced far too high, and to date no such site has been found.

The examiner concluded that, in view of the time required to promote, construct and commence operations in both mining and milling, after the Snowflake spur construction is a certainty and the ore body proven, iron ore traffic must

be eliminated from the revenue estimates for the first five years of operation. We agree. The prospects of iron ore traffic are too speculative to be considered.

The movement of sugar beets was considered by the applicant to be a major source of revenue. The examiner agreed with the contention of the protestants that there is no reasonable prospect that sugar beets would be transported by the applicant during the initial 5-year period of operation. The applicant initially estimated that sugar beets would make up 17 percent of the total traffic for the initial period and produce a like percentage of revenues (approximately $307,763 during the first year). In its exceptions, applicant conceded that its revenue estimate for this commodity was too high and that the first year sugar beet revenues were overstated by $203,052. Under the revised estimate, sugar beet revenues would be $104,710.

Gaines County, the main agricultural area in the applicant's territory, is about 150 miles from the closest sugar beet refinery at Hereford, Texas. The protestants contend that the Permian Basin area is too remote from the processing plant and assert that sugar beets normally move only within a 40 or 50 mile radius of a refinery.

The applicant has referred to instances in which sugar beets have moved greater distances and states that Gaines County beets, because they would be harvested months later than those in more northern counties, would be brought the greater distance to the Hereford plant to keep the plant in operation for six months rather than three or four months a year. Although only test planting of sugar beets has been started in the area, it is reasonable to conclude that applicant would derive some revenue from sugar beet traffic during the first five years of operation and that its estimate is not unduly optimistic.

The protestants estimated, and the examiner accepted, revenues of $30,519, from transportation of grain, whereas the applicant predicted revenues of $381,120.73 on such traffic. We believe that the examiner erred in accepting the protestants' estimates, although we agree that applicant would not secure all the traffic in coarse grain in the two-county area. Although it is not possible to predict the precise amount of coarse grain traffic that would be moved by applicant, it is clear that, considering the vast production of grain in Gaines and Andrews Counties, and the adaptability of this commodity to rail transportation, applicant would secure a much larger share of this traffic than was estimated by the protestants.

Metallic oil field supplies are required in large quantities in the oil fields of the three counties in both the drilling and production stages. At present, the steel companies and suppliers maintain large inventories at Odessa and Hobbs where pipe coating facilities are located. From these points well sites are served by truck over a radius of about 100 miles. The applicant, as shown in Appendix A, estimated revenues from oil field supplies of $131,237.19 in the first year of operation. The examiner accepted the protestants' estimate that first year revenue from this traffic would amount to only $2,268. The difficulty in arriving at a precise figure for prospective traffic can be seen from the wide disparity in these estimates. We cannot accept the protestants' premise that no change in the distribution system would result from constructing a railroad in this prosperous oil producing area. In our opinion, applicant's estimate is more realistic than that of the protestants.

Several other commodities, such as new automobiles, anhydrous ammonia, cotton and petroleum products were either excluded from the examiner's revenue projections

for the first year operation, or were credited with only a minimal amount of prospective revenue. We believe that applicant's study, performed by local residents with intimate knowledge of the area, supports a much larger revenue projection than that accepted by the examiner.

Even accepting the examiner's and protestants' revenue projections, the deficit of the applicant in the first year of operation would be only slightly in excess of $100,000. This estimated deficit is based on total potential traffic of $228,928, as shown in Appendix B.

The protestants also presented an exhibit in which they deleted certain of the applicant's projected traffic, such as sugar beets and iron ore, certain other items eliminated by applicant's witness, and certain traffic considered by protestants to duplicate other traffic in applicant's projected revenue. This exhibit showed railway net operating income of $863,708 and total expenses, including tax accrual and car rental, of $690,912, or a net income of $172,912. The protestants in presenting this exhibit maintained that a large amount of revenue should be eliminated on the ground that applicant would not secure the traffic in question. This exhibit shows, however, that as the applicant's projected revenue rises, its projected costs do not rise in the same proportion.

For the reasons set forth above, we cannot accept without substantial modification the applicant's projection of income indicated in Appendix A or protestants' shown in Appendix B. The most reasonable estimate warranted by the evidence of record is that revenue for the first year would be in the neighborhood of $600,000. This estimate is based on movements of sugar beets, grain, new cars, petroleum products, fertilizer, lumber, and other commodities in volumes considerably greater than those estimated

by protestants and considerably less than estimated by applicant. With revenues of $600,000 a year and projecting railway costs in the same general way employed by protestants in their exhibits, applicant would incur costs in the neighborhood of $550,000 and derive net income of about $50,000. Such net income would fall far short of the $300,000 debt service expense contemplated by applicant.

DISCUSSION AND CONCLUSIONS

This is an unusual case. In an age of declining rail mileage, this proceeding stands out as a proceeding to construct a new railroad. The applicant and the residents of the area have shown great faith in the future growth of the three counties involved. Within reasonable limits, residents of the area involved should be permitted to assume the risks involved in constructing a railroad. If those most directly concerned are willing to risk their capital with full knowledge of all relevant circumstances, the Commission should be most reluctant, for reasons of paternalism, to deny them an opportunity to improve the economy of their area. This is particularly true where the area involved has been largely dependent on the prosperity of a single industry but may with the aid of adequate rail service develop a more diversified economic base. There is a substantial reservoir of traffic available in the area and applicant should not be denied an opportunity to tap it unless the Commission is reasonably certain that its knowledge of local economic conditions exceeds that of those in the area who are prepared to invest in its future.

Even considering that applicant's traffic study necessarily was imprecise, it is inconceivable that a railroad operating in a prosperous area of size involved here would not attract some new industry and would not alter existing

production and marketing patterns for such commodities as sugar beets, oil field equipment and supplies, new automobiles, grain, cotton, and several other commodities. Furthermore, the record clearly shows that protesting rail carriers would not be materially affected by a grant of the application.

The Seagraves-Odessa corridor presents an attractive route for the construction of a railroad. It appears well chosen to obtain the maximum amount of traffic not now handled by existing carriers. Shippers and receivers in the area would derive great advantages from the proposed line. Numerous industrial concerns will not consider locating a plant in an area not served directly by a railroad. To deny this application on the ground that industry must first be attracted to the area would involve a determination of the relative priority of the chicken and the egg.

The controlling precedent for the disposition of this proceeding is *Construction of Line by Wenatchee Southern Ry. Co.*, 91 I.C.C. 237 (1924). That case involved an application for a certificate to construct a line of railroad 82 miles long and to serve a territory already served by the Great Northern Railway Company. The primary purpose of the application was to provide an additional facility to move apples from the Wenatchee district in Washington. The Great Northern opposed the application on essentially the same grounds pressed by the protestants herein. The Commission, in granting the application in the *Wenatchee* case, found that the line, at least in its first few years of operation, probably would be unable to meet its operating expenses. Nevertheless, the Commission concluded at pages 255 and 256 of its report:

> "Ability to earn is not the sole test of public convenience and necessity, although always a factor to

be given consideration. When such ability is shown to exist a strong presumption may arise that public need for the new facility exists. When not shown to exist it may frequently be concluded that such need is too slight to warrant the expenditure necessary for the proposed construction. When it is established, however, that a project will render important public service, and its sponsors are willing to assume the risk of loss in the expectation of ultimate gain either directly through the property or indirectly through benefits to themselves and to the shipping community, the requirements as to the public interest may be fully satisfied, although losses to investors seem more probable than gains. We are to consider what is best in order to foster, build, and make efficient transportation facilities as a whole in the interest of the greatest number. Where only the private aspect is involved, individuals are at liberty to take risks. So far as the public is concerned, the advantage of new or better service may be so great as to justify increasing the burden upon shippers generally by the amount necessary to sustain the facility. If it should prove later, however, that the line, because of competitive conditions, lack of business, or other circumstances, can not be operated profitably under fair divisions and fair rates, the burden of the loss would properly fall upon the investors and not upon the shipping public. Our approval of a new enterprise neither constitutes nor requires a finding that such enterprise will prove successful. Our responsibility is to determine the public interest involved in the construction of the line. The history of railway construction illustrates that prospective tonnage depending for its development upon transportation facilities, rather than tonnage immediately in view, has been the main justification for rail-

way construction. Progress has involved risks. It is not to be presumed that the Congress contemplated discarding, as insufficient, conditions which in the past have furnished the warrant for a constructive policy in the upbuilding of the system of transportation. It is rather to be presumed that the Congress did not contemplate an interpretation of its enactment which, applied as a policy in the past, would have prevented the construction of many railway properties now serving the public interest in an important way. Prospective earnings or losses may properly be considered as one of the factors evidencing the public interest, but, taken alone, do not determine whether a particular enterprise is or is not required by public convenience and necessity."

Commissioner Eastman stated in his concurring expression at pages 257 and 258 of the report:

"I think it altogether unlikely that, if constructed, it will be able to earn interest on the investment for some considerable period of time. It may not even be able to earn operating expenses. At the same time, I do not believe that the line, if built, will ever be abandoned. It might become insolvent and it might be sold to pay its debts, but I doubt that all of the connecting trunk lines would permit its operation to be discontinued. If, then, there are those in the Wenatchee district who are willing to face the certain risk of present construction because of indirect advantages which they might gain, and if they are willing, as it is claimed that they are, to submit to such limitations as we may s fit to impose with respect to the character of the securities used in financing the venture, I see no reason why we should not grant the certificate."

The argument for denial of the application in this proceeding is largely based on the anticipated debt service expense of $300,000 and the consequent need to protect investors. The Commission in the *Wenatchee Southern* case concluded that the feasibility and fairness of plans to finance the proposed railroad should not be considered prior to the filing of an application under Section 20a of the Act. The same rule should be followed here. In reviewing such an application, the Commission might conclude that the Permian Basin Railroad should be financed entirely by the sale of common stock or by stock and contingent income bonds. As stated by Commissioner Eastman at page 258 of the report in the *Wenatchee Southern* case:

> "Without prejudice to any further evidence that may be presented if and when authority is sought to issue securities under section 20a of the act, I am of the opinion, upon the present record, that we ought to require the original construction of the line to be financed by the sale of stock. By such a requirement investment will as a practical matter be confined to those who appreciate the risk and are willing to face it. Furthermore, this railroad, if constructed, will need ample borrowing capacity in order to carry on through the development period."

We believe that the record shows a need for direct rail service in the Odessa-Seagraves corridor and that such service would foster further development of the tributary area.

We therefore find that the present and future public convenience and necessity have been shown to require the construction and operation by the Permian Basin Railroad Company of the line of railroad in Ector, Andrews and Gaines Counties, Texas herein described. The application is granted. An appropriate certificate and order will be entered.

COMMISSIONERS WALRATH *and* GOFF concur in the result.

COMMISSIONER TUGGLE, whom VICE CHAIRMAN TIERNEY and COMMISSIONER MURPHY JOIN, dissenting:

Aside from its analogy to the situation in *Construction of Line by Wenatchee Southern Ry. Co.*, 90 I.C.C. 237, the majority predicates its grant upon four propositions alien to the facts of record and the law, viz., (1) this Commission should not be paternalistic in dealing with the area's residents who are willing to risk their capital with full knowledge of all relevant circumstances; (2) the Commission, knowing no more than prospective investors in the area about the local economic conditions should not preclude the local people from investing in the future of their area; (3) it is inconceivable that a railroad operating in a prosperous area of the size involved here would not attract some new business; and (4) a denial of this application would involve a determination of the relative priority of the chicken and the egg.

Whatever may be the merits of these propositions, a decision based thereon is a decision based, not on the law or facts, but on faith, hope and charity, and in disregard of the statutory mandate. In a purely private matter not affecting the public interest in a substantial or essential way, I would unhesitatingly support the proposition that people should be free to invest, risk, or spend their own money in any legitimate way they choose. But this is not such a matter. We are here concerned with a project imbued with the public interest, and one for which Congress has laid down definite standards. Section 1(18)-(20) of the Act, (under which the application was filed), and the national transportation policy, establish the legal requirements and our guide for decision. They impose upon the applicant an obligation to show that the proposed line is

required by the public convenience and necessity; and upon the Commission, a duty to decide the case on the basis of that showing, and not on presumption.

As stated by the Supreme Court in *Illinois C. R. Co.* v. *Norfolk W. R. Co.*, 385 U.S. 57, 66-67 (1966):

> This court has repeatedly held that if a railroad, voluntarily proposing the extension of its lines, *can show* that its proposal "either presently or in the reasonably near future *will be self-sustaining, or so nearly so as not unduly to burden interstate commerce,* the Commission may issue a certificate authorizing the proposed line," *Interstate Commerce Commission* v. *Oregon-Wash. R. & Nav. Co.*, 288 U.S. 14, 37 (1933). The Commission, however, "*must be convinced* that the proposed venture will not drain the railroad's resources and disable it from performing those duties of public service under which it then rested, with consequent detriment to the public in the matter of service and rates." *Ibid.*

In *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U.S. 266 (1926) at p. 277, the court pointed out that—

> . . . earning capacity, and conservation of the financial resources of individual carriers is a matter of national concern; . . . that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public . . . that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss.

Again, in *Ches. & Ohio Ry.* v. *United States*, 285 U.S. 35, 42 (1931), the Commission's obligation in this type of case was further emphasized when the Supreme Court described the purpose of sections 1(18) and 1(20) as—

> . . . to enable the Commission, in the interest of the public to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service.

It is plain, therefore, that when this Commission, in appraising the record, insists upon an applicant sustaining the evidentiary burden imposed by law, it is performing its assigned duty with regard to the Nation's transport system, and is not exercising a gratuitous paternalism toward the entrepreneurs. Further, in performing this duty, the Commission is not free to confess lack of adequate knowledge, and, on that ground, defer to the judgment of the applicant and its promoters. If the applicant's evidence does not convince, then the application must be denied.

Here the applicant's evidence is etheral. And no matter how much weight is given to the promoters' enthusiasm and willingness to take the financial risks involved, the decision cannot rest on their dream. Dreams, confronted by the hard economic facts of life, were shattered by bankruptcy more than 35,500 times in this country in 1965, with 370 of them in the field of transportation.[1] The majority of those bankruptcies occurred within the first five years of business, indicating that almost the entire life of those businesses ran concurrently with a record-breaking national prosperity. And 1965 was not an atypical year for bankruptcies.

To face up to the facts in this case—even as the applicant presents them—it must be acknowledged that:

1. The iron ore traffic which the applicant estimated would produce 18 percent of its revenues and 25 percent of its traffic, is simply not within reach in the foreseeable future. Moreover, the steel mill, if ever realized, would be located in Odessa accessible to an existing rail line fully capable of taking whatever competitive measures are needed to capture the traffic.

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[1] *Statistical Abstract of the United States,* 1966, 87th Annual Edition, U.S. Dept. of Commerce, Bureau of Census, page 504.

2. The anticipated sugar beet traffic, accounting for 17 percent of the traffic in the applicant's initial estimate, was virtually written off when, on exceptions, the applicant described it as speculative traffic, and argued that "if not this product another product would be shipped and produce comparable revenue."

3. Coarse grain, making up 24 percent of the tonnage in the applicant's estimate, is today grown, in large part, closer to existing rail facilities than to the site of applicant's proposed line, and, under the economics of the situation, would not be available to the applicant. Moreover, the applicant's estimate is unreliable in that it contains a 100 percent duplication as to the grain-producing Gaines County, and is based on the unwarranted assumption that all grain produced in the three counties would move via applicant, notwithstanding the well developed motor carrier service now utilized and the closer proximity to existing railheads.

4. Metallic oil field supplies undoubtedly would provide some traffic to the applicant, but their distribution would continue largely from Odessa which is centrally located in the Ector County oil fields and from Hobbs and other established storing and processing points located on existing rail lines.

5. The cotton tonnage estimated by applicant for its first year of operation was twice the area's production in the latest year of record. This commodity, and others, such as, beer, fertilizer, cement, sand gravel, and new automobiles, presently move to and from the area substantially by truck, notwithstanding the existence of rail service thereat.

A realistic analysis of the applicant's evidence makes it manifest that about 50 percent of the anticipated traffic would not materialize. If adequate weight were attributed the capability of existing transportation facilities to intensify their competitive efforts to prevent diversion of traffic, it would become apparent that even a greater percentage would not be available to the applicant. Since the applicant's estimate of costs is on a bare-bones or shoestring basis, it must be concluded that the reduction in traffic would not be accompanied by a proportionate reduction in costs; and further, that the proposed line has little chance, if any, to become self-sustaining or even nearly so.

Thus, on the basis of potential traffic and probable financial results of operation, there is no substantial showing that the proposed line is required by the public convenience and necessity. In addition, the rapid growth of the area in the recent past is evidence of the sufficiency of existing transportation. Besides the abundant supply of truck transportation in the area, it must be recognized that more than 75 percent of the people in the three counties, live in localities that already have rail service.

Nor is the evidence convincing that the local people have "a full knowledge of all relevant circumstances" as is implied in the majority report, or that they are willing to risk their capital on the basis of the promotional activity. The record shows that 13 individuals who are promoting the enterprise have paid in $5,000 or about 1/20 of one percent of the estimated amount needed to construct the railroad. An additional $40,000 was paid in by others in return for an assignment of stock subscription rights; the total amount paid in being less than ½ of one percent of the construction costs.

This indicates a marked hesitancy on the part of all concerned. And in view of that, this Commission should be most reluctant to signify approval on the basis of this tenuous record, particularly since that approval and the finding that the railroad is needed to satisfy the requirements of the public convenience and necessity, can, in turn, be used to help market the applicant's securities. Regardless of how the enterprise is financed, whether by borrowed funds or the sale of stock, the ordinary legal safeguards upon which the public relies in dealing with securities in general will not apply. For the issuance of carrier securities is under the surveillance of this Commission. It ill behooves this Commission, therefore, to issue a report which, in effect, gives every indication that the proposed rail operation will be a glowing success. It should be made perfectly clear, as was done in the *Wenatchee Southern* case, *supra,* that the enterprise shows little promise of success.

The majority report's analogy to the *Wenatchee Southern* case is entirely inapt. That case was decided in 1924 prior to the development of a significant motor carrier industry, and it involved a one-product (apples) area totally dependent upon rail service. For years the rail service had been inadequate, as a result of which the local shippers suffered great losses year after year from delay in getting the apples to market; and there was in fact a dire need for additional transport. The shippers themselves had established a guaranteed fund, based on an assessment per box of apples, to help the new carrier meet its operating deficits and fixed charges. In the case at hand, existing transport by rail and motor truck has been plentiful and has aided the territory in its extraordinary growth.

It is interesting to note that the great hesitancy on the part of the Commission in authorizing the Wenatchee Southern's operation (the vote was five to five with one reluctant concurrence in favor of the grant), was entirely justified. After twice extending the period for instituting service, the Commission, in 105 I.C.C. 347 (1929) refused to grant another extension, after the certificate authorizing the operation had been permitted by the carrier to expire by its own limitation.

In my opinion it is error to say that because the application was granted in *Wenatchee Southern, supra*, the application here should also be granted. If anything, the history of the Wenatchee Southern should stand as a lesson in the hard facts of economic life and be warning that, where little need, if any, exists for more transport facilities, additional facilities are likely to falter, and their burden will fall upon the transport system generally.

Appendices A and B to the Commission's report are the same as Appendices A and B to the Hearing Examiner's report.

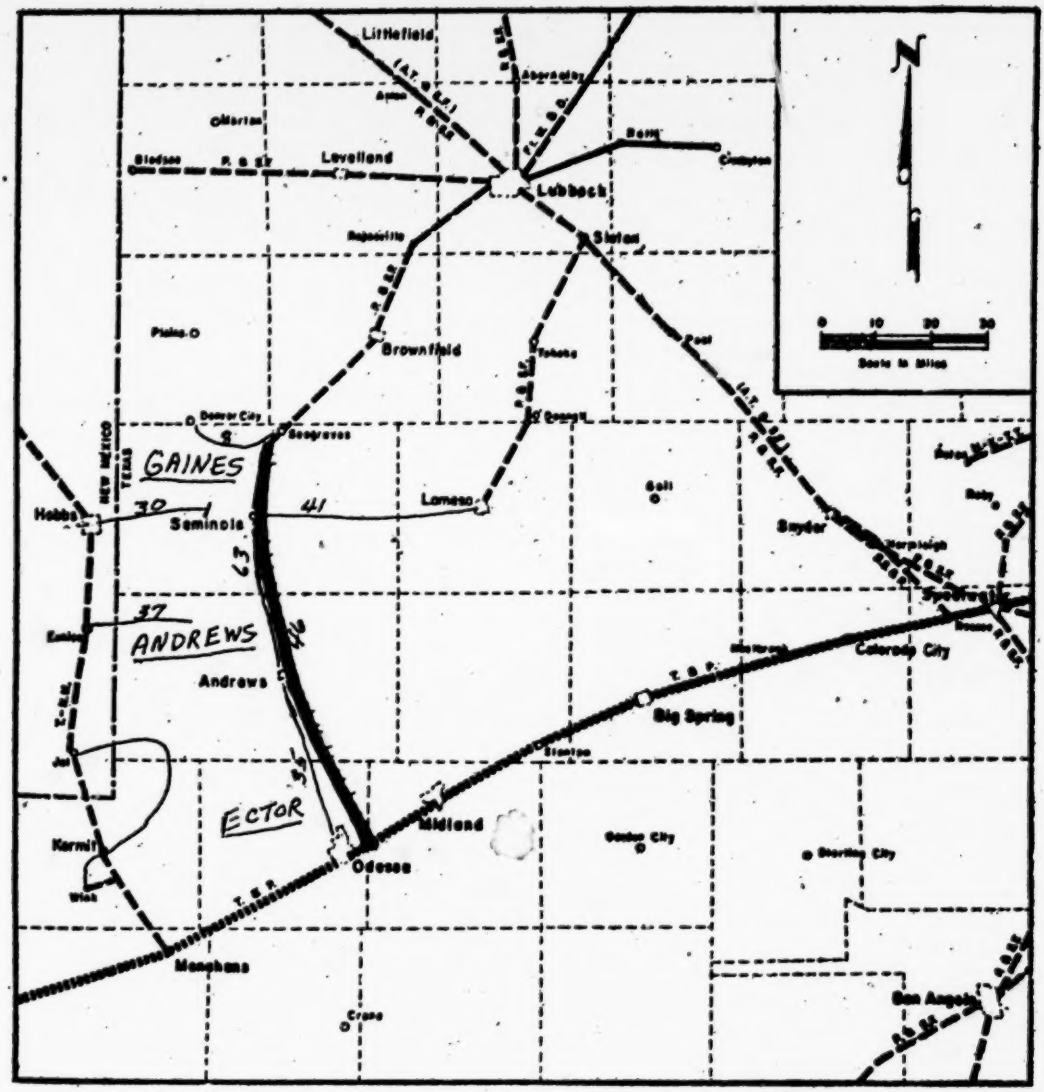
APPENDIX C

APPENDIX C

F.D. No. 22475

RAILROAD MAP OF THE PERMIAN BASIN AREA

AUGUST, 1963



ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C.,

on the day of 1967.

Finance Docket No. 22475

PERMIAN BASIN RAILROAD CO. CONSTRUCTION BETWEEN ODESSA AND SEAGRAVES, TEXAS

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and the Commission on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, referred to and made a part hereof.

It is hereby certified, That the present and future convenience and necessity permit construction and operation by the Permian Basin Railroad Company of the line of railroad in Ector, Andrews and Gaines Counties, Texas, described in the report, provided, however, that this certificate is issued upon the express condition that the aforesaid construction shall be commenced on or before April 1, 1968, and shall be completed on or before April 1, 1970;

It is ordered, That the Permian Basin Railroad Company shall report to the Commission, in writing, the commencement and completion of the construction herein authorized within 15 days after such commencement and completion, respectively;

It is further ordered, That when filing schedules establishing rates on the line herein authorized to be constructed, the railroad shall refer to this certificate and order by title and date and docket number;

It is further ordered, That the railroad shall submit for the consideration and approval of this Commission, two copies of the journal entries showing the construction of the line on its books;

And it is further ordered, That this certificate and order shall take effect and be in force from and after 30 days from the date hereof.

By the Commission.

(SEAL)

H. Neil Garson,
Secretary.

APPENDIX 3

OPINION OF THREE-JUDGE COURT, MAY 17, 1968

Before GOLDBERG, Circuit Judge, HUGHES and BREWSTER, District Judges.

Per Curiam: This is a suit under Title 28 U.S.C. §2284 and §2321-2325 to set aside a Report and Order of the Interstate Commerce Commission which authorized the construction and operation by the Permian Basin Railroad Co., of a railroad line between Odessa and Seagraves, Texas. Plaintiffs contend that the Commission made insufficient findings and that such findings as it made were not supported by substantial evidence.

Upon the filing of an application by the Permian Basin Railroad Company an I.C.C. examiner conducted extensive hearings and compiled a 43-page report recommending that the application be denied. That recommendation was based primarily on his conclusion that the proposed railroad would not attract freight business in sufficient volume to operate at a profit.

The Commission majority found that for a number of commodities expected to become rail traffic the evidence warranted "... a much larger revenue projection than that accepted by the examiner", and that certain other commodities excluded from the examiners total revenue projection would be likely to produce income for the new railroad. The majority estimated that first-year revenues would be "... in the neighborhood of $600,000" and that costs would be about $550,000, leaving a net income of $50,000. Further, the Commission determined that a need exists for rail service over the proposed route and that such service would stimulate further development of a

heretofore underdeveloped area. It specifically held that ". . . protesting rail carriers would not be materially affected by a grant of the application." We believe that each of these findings is supported by substantial evidence.

Nevertheless, plaintiffs complain that the Commission's findings regarding profitability were insufficient in that they were too vague, unsupported by subsidiary findings and lacking a rational basis. We disagree. Although the Commission did not compute a precise estimate of projected revenues and costs for each commodity, it did make an estimate of *total* revenues and costs, and, further, it named the commodities upon which it focused in revising the examiner's estimate. We believe this to be a sufficient finding of profitability. To require greater specificity of the Commission in predicting the unpredictable is in our view unnecessary.

In addition, it should be noted that profitability is only one factor, albeit a major one, to be considered. The ultimate question is public convenience and necessity. The presence of a great need in the Permian Basin for the proposed railroad balanced against only a minimal threat of hardship to other carriers provides an adequate basis for the Commission's order, irrespective of profitability. *Construction of Line by Wenatchee Southern Ry. Co.*, 90 ICC 237 (1924).

The order of the Commission is hereby approved.

/s/ *Irving L. Goldberg*
United States Circuit Judge

/s/ *Sarah T. Hughes*
United States District Judge

/s/ *Leo Brewster*
United States District Judge

Order Entered June 20, 1968

ORDER

It appearing to the Court that the opinion filed in this cause on May 17, 1968, should be amended to correct an unintentional omission, it is accordingly

ORDERED that the last paragraph of said opinion appearing on page 3 thereof is amended to read as follows:

"The order of the commission is hereby approved, the temporary injunction entered November 6, 1967 is dissolved, and all further relief prayed for by plaintiffs is denied."

Entered this 20 day of June, 1968.

/s/ *Irving L. Goldberg*
United States Circuit Judge

/s/ *Sarah T. Hughes*
United States District Judge

/s/ *Leo Brewster*
United States District Judge

APPENDIX 4

RAILROADS ABANDONED — 1942-1967

Name	Date of Abandonment	Finance Docket No.	Date of ICC Order	Citation
1. The Crystal River and San Juan R. Co.	9-10-42	13356	9-22-41	249 I.C.C. 240
2. Fredricksburg & Northern Ry. Co.	8-15-42	13635	5-22-42	
3. The Greene County R. Co.	5- 1-42	13537	2-21-42	
4. Nevada County Narrow Gauge R. Co.	8-30-42	13687	5-21-42 on amend 5-29-42	
5. Scholarie Valley Ry. Co.	9-15-42	13785	7-31-42	
6. The Sibley, Lake Bisteneau & Southern Ry. Co.	8- 1-42	13606	5-22-42	
7. Tionesta Valley Ry. Co.	4-20-42	13428	11-13-41	249 I.C.C. 521
8. Arkansas Valley Ry., Inc.	2- 1-43	13619	7-20-42	
9. Delaware & Northern Ry. Co.	11-10-42	13931	10- 1-42	254 I.C.C. 811
10. Mississippi Eastern Ry. Co.	12-27-42	13972	11-25-42	254 I.C.C. 814
11. Nashville-Franklin Ry.	3-15-43	14040	2- 4-43	254 I.C.C. 819
12. Port San Luis Transp. Co.	2-15-43	13939	10-19-42	254 I.C.C. 812
13. Gulf & Northern Ry. Co.	4-25-43	14071	4- 6-43	254 I.C.C. 821
14. Newaukum Valley R. Co.	4-10-43	14090	3- 5-43	254 I.C.C. 822
15. Wilmington, Brunswick and Southern R. Co.	5- 5-43	14127	4-15-43	254 I.C.C. 823
16. Wesson Company (Indiana Railroad Division)	9-10-43	14216	6-25-43	254 I.C.C. 827
17. Ray and Gila Valley R. Co.	12-16-43	14328	10-22-43	254 I.C.C. 830

RAILROADS ABANDONED — 1942-1967

	Name	Date of Abandonment	Finance Docket No.	Date of ICC Order	Citation
18.	Alabama & Florida Transportation Co.	2-28-44		no orders	
19.	Jacksonville, Gainesville & Gulf Ry.	7- 1-44	14171	5-10-44	257 I.C.C. 801 Portion of line abandoned
20.	Monson R. Co.	5-25-44	14314	10- 4-43	254 I.C.C. 830
21.	Eastland, Wichita Falls & Gulf R. Co.	11-10-44	14432	5-10-44	257 I.C.C. 803
22.	St. Louis and Hannibal R. Co.	10- 1-44	14445	2-29-44	
23.	Oklahoma Railway Company (Robt. K. Johnston and A. C. Debolt, Trustees)	8-16-44	14221	5-17-44	257 I.C.C. 177 Planned abandonment acquired by SF&RI
24.	Tuckaseegee and Southeastern Ry. Co.	11-10-45	14905	9-21-45	261 I.C.C. 808
25.	Marshall, Elsian Fields and Southeastern Ry. Co.	6-15-45	5852	12-11-26	
26.	Sabine & Neches Valley Ry. Co.	6-25-45	14766	4- 4-45	261 I.C.C. 805
27.	Sheffield and Tionesta Ry. Co.	2-20-46	14099	6- 9-43	
28.	Springfield & Southwestern Ry. Co.	1-15-46	14765	4- 9-45	261 I.C.C. 805
29.	Yosemite Valley Ry. Co.	8-28-45	14688	6-26-45	261 I.C.C. 803
30.	Bay Point and Clayton R. Co.	8-25-46	15315	7-23-46	261 I.C.C. 814
31.	Chicago, Attica & Southern R. Co.	5-15-46	15031	4-12-46	261 I.C.C. 811

RAILROADS ABANDONED — 1942-1967

	Name	Date of Abandonment	Finance Docket No.	Date of ICC Order	Citation
32.	Flint River and North-eastern R. Co.	10- 8-46	15373	9- 3-46	267 I.C.C. 804
33.	The Salt Lake & Utah Railroad Corporation (S. J. Quinney Rec)	7-15-46	15153	4-29-46	261 I.C.C. 813
34.	Arkansas Harbor Terminal Ry.	1-15-47	15488	12-10-46	267 I.C.C. 808
35.	Bois D'Arc and Southern Ry. Co.	No docket no.			
36.	Evansville & Ohio Valley Ry. Co., Inc.	1-10-47	15390	10- 1-46	267 I.C.C. 804
37.	Nevada Copper Belt Ry. Co.	3-24-47	15438	1-14-47	267 I.C.C. 805
38.	Rio Grande and Eagle Pass Ry. Co.	1-21-47	15481	12-10-46	267 I.C.C. 807
39.	Pittsburg County Ry. Corp.	5- 1-47	15604	3-26-47	267 I.C.C. 811
40.	Tonopah and Goldfield R. Co.	10-15-47	15454	1-14-47	267 I.C.C. 806
41.	The Union Electric Ry. Co.	On one day notice 4-25-48	34186 15679	7-23-47 7- 2-47	267 I.C.C. 813
42.	The Utah, Idaho Central R. Corp. (S. J. Quinney Rec.)	7-25-47	15549	6-20-47	267 I.C.C. 809
43.	Ouachita and North Western R. Co.	4-15-47	15563	3-10-47	267 I.C.C. 810
44.	The Pittsburg, Shawmut and Northern R. Co. (Thomas C. Buckann and Robt. C. Spraill, Jr. Trustees)	4-15-47	15330	12-26-46	267 I.C.C. 802

RAILROADS ABANDONED — 1942-1967

	Name	Date of Abandonment	Finance Docket No.	Date of ICC Order	Citation
45.	Rapid City, Black Hills & Western R. Co.	3- 1-48	15626	12-29-47	267 I.C.C. 816
46.	Atlantic and Carolina R. Co.	4-14-48	15945	2-24-48	267 I.C.C. 820
47.	The Midland Terminal Ry. Co.	2-15-49	16138	8-25-48	271 I.C.C. 814
48.	Bingham and Garfield Ry. Co.	8- 1-48	16093	6-24-48	271 I.C.C. 804
49.	West Feliciana Ry. Co.	5-15-48	15623	4- 5-48	267 I.C.C. 816
50.	Clarion River Ry. Co.	4-15-49	16287	12- 1-48	267 I.C.C. 807
51.	DeKalb & Western R. Co.	12-30-49	16589	8- 5-49	267 I.C.C. 814
52.	Virginia & Truckee Ry.	5-31-50	16407	4-19-50	275 I.C.C. 803
53.	Bennettsville and Cheraw R. Co.	9-15-50	16923	8- 3-50	275 I.C.C. 811
54.	Jamestown, Westfield and Northwestern R. Co.	8-15-50	16570	12-12-49	275 I.C.C. 804
55.	The Lewiston & Youngstown Frontier Ry. Co.	9-16-50	16932	7-21-50	275 I.C.C. 811
56.	The Ohio & Morenci R. Co.	2-20-51	16332	8-30-50	275 I.C.C. 803, 818
57.	Middle Creek R. Co.	4-24-51	17101	3-14-51	275 I.C.C. 815
58.	Manchester and Oneida Ry. Co.	12- 5-51	17469	10-11-51	282 I.C.C. 808
59.	Tennessee & North Carolina Ry. Co.	6- 1-51	17077	3- 8-51	275 I.C.C. 814
60.	The Rio Grande Southern R. Co. (Pierpont Fuller, Jr. Rec.)	5-15-52	17624	4- 8-52	282 I.C.C. 811
61.	Rock Island Southern Ry. Co.	7- 3-52	17441	5-23-52	282 I.C.C. 808

RAILROADS ABANDONED — 1942-1967

	Name	Date of Abandonment	Finance Docket No.	Date of ICC Order	Citation
62.	The Winona R. Co.	6-15-52	16566	6-20-51	275 I.C.C. 818
63.	Artemus-Jellico R. Co.	11- 1-52	17803	7-29-52	282 I.C.C. 816
64.	Camargo and Western R.	No docket no.			
65.	The Colorado and Southeastern R. Co.	11- 1-52	17834	8-21-52	282 I.C.C. 816
66.	Ligonier Valley R. Co.	9-15-52	17560	5-28-52	282 I.C.C. 810
67.	Trans Florida Central R. Co.	11-30-52	17799	9-29-52	282 I.C.C. 815
68.	The Denver and Intermountain R. Co.	3-16-53	17595	2- 4-53	282 I.C.C. 811
69.	The Murfreesboro and Nashville R. Co.	3-15-53	17654	9-23-52	282 I.C.C. 812
70.	Tama and Toledo R. Co.	1-31-53	17943	12-16-52	282 I.C.C. 818
71.	Verde Tunnel and Smelter R. Co.	5-16-53	17488	11-27-51	282 I.C.C. 808
72.	Detroit, Caro and Sandusky Ry. Co.	10- 1-53	17831	7-14-53	290 I.C.C. 803
73.	Hooppole, Yorktown and Tampico R. Co.	11-15-53	18071	5-19-53	290 I.C.C. 804
74.	Port Angeles Western R. Co.	12- 1-53	18219	10-22-53	290 I.C.C. 804
75.	Osage Ry. Co.	12-15-53	18259	10-20-53	290 I.C.C. 808
76.	Suncook Valley R.	2- 1-54	17866	3- 3-53	282 I.C.C. 817
77.	The Joplin-Pittsburg R. Co.	2-28-54	18300	12- 7-53	
78.	Oneida & Western R. Co.	3-15-54	18065	1-20-54	290 I.C.C. 804
79.	Sylvania Central Ry. Co.	3-28-54	18230	2-15-54	290 I.C.C. 807

RAILROADS ABANDONED — 1942-1967

Name	Date of Abandonment	Finance Docket No.	Date of ICC Order	Citation
80. The Huntingdon and Broad Top Mountain R. and Coal Co. (Glen A. Troutman Trustee)	5- 1-54	18017	12- 9-53	290 I.C.C. 804
81. Jacksonville Northwestern Ry. Co.	5-10-54	18471	4-16-54	290 I.C.C. 812
82. Red River and Gulf R.	5- 1-54	18406	3-23-54	290 I.C.C. 811
83. Longview, Portland & Northern Ry. Co.	12- 1-54	17995	3- 2-53	290 I.C.C. 804
84. The Nacogdoches & Southeastern R. Co.	7-18-54	18313	1-12-54	290 I.C.C. 809
85. Valley R. Co. (of Pa.)	12- 5-54	18127	8-13-53	290 I.C.C. 805
86. The Waterville R. Co.	10- 1-54	18379	3-23-54	290 I.C.C. 811
87. Wichita Falls & Southern R. Co.	8-15-54	18163	6-10-54	290 I.C.C. 303
88. Cowlitz, Chebalis & Cascade Ry.	5-10-55	18532	3-30-55	290 I.C.C. 813
89. The Bay Terminal R. Co.	10- 1-55	18879	5-13-55	295 I.C.C. 807
90. Flemingsburg and Northern R. Co.	11-28-55	19020	10-19-55	295 I.C.C. 810
91. Montana, Wyoming & Southern R. Co.	11-20-55	18276	3-22-55	290 I.C.C. 808
92. Talbotton R. Co.	1-28-57	19552	12-18-56	295 I.C.C. 823
93. California and Oregon Coast R. Co.	3-25-57	19073	11- 6-56	295 I.C.C. 812
94. Cassville & Exeter Ry. Co.	1- 1-57	19502	11- 6-56	295 I.C.C. 821
95. Chicago and Calumet River R. Co.	12-19-56	19399	11-20-56	295 I.C.C. 819

RAILROADS ABANDONED — 1942-1967

Name	Date of Abandonment	Finance Docket No.	Date of ICC Order	Citation
96. The Hamlin & Northwestern Ry. Co.	No docket no.			
97. Paris and Mt. Pleasant R. Co.	2-18-57	19312	6-18-56	295 I.C.C. 817
98. Saratoga & Schuylerville R. Corp.	12-28-56	19009	8- 6-56	295 I.C.C. 810
99. Colorado R., Inc.	6-15-57	19540	4-24-57	295 I.C.C. 822
100. Lakeland Ry. Co., Inc.	7- 1-57	19705	5- 8-57	295 I.C.C. 827
101. New York, Ontario and Western Ry. Co. (Jacob Grumet and James B. Kilsheimer III Rec.)	12- 1-57	19861	10-10-57	295 I.C.C. 831
102. St. Francois County R. Co.	11-15-57	19815	8-26-57	295 I.C.C. 829
103. The Toledo and Eastern R. Co.	7-17-58	20050	3-13-58	295 I.C.C. 835
104. Emory River R. Co.	9- 1-58	20212	7- 9-58	295 I.C.C. 838
105. The Jay Street Connecting R.	6-27-59	20240	4-13-59	307 I.C.C. 137
106. The Mansfield Ry. & Transportation Co.	5-28-59	19645	7-17-58	295 I.C.C. 825, 841
107. The Big Creek and Telocaset R. Co.	9- 6-59	20618	6-15-59	307 I.C.C. 818
108. Canton & Carthage R. Co.	2-15-60	20814	11-13-59	307 I.C.C. 812
109. Galesburg and Great Eastern R. Co.	7-15-60	20636	7-15-60	307 I.C.C. 810
110. The Marcellus and Otisco Co., Inc. operating Marcellus & Otisco Lake Railroad	6- 1-60	21001	4- 7-60	

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RAILROADS ABANDONED — 1942-1967

	Name	Date of Abandonment	Finance Docket No.	Date of ICC Order	Citation
111.	The Castleman River R. Co.	No docket no.			
112.	Unadilla Valley Ry. Co.	11-20-60	20989	4-20-60	
113.	St. Louis & Troy R. Co.	2- 6-61	21279	12- 7-60	
114.	Alabama Central R. Co.	5-27-61	21081	8-31-60	
115.	Chicago, Aurora and Elgin Ry. Co.	7- 1-61	20623 (20108)	5- 2-61	307 I.C.C. 533 312 I.C.C. 533
116.	Columbia & Millstadt R. Co.	7-15-61	21251	5-15-61	
117.	Cumberland Ry. & Coal Co.	8-12-61	No docket no.		
118.	Tallulah Falls Ry. Co. (H. L. Brewer Rec.)	4-15-61	20781		
119.	East Jordan & Southern R. Co.	10- 1-61	21505	6-12-61	
120.	Sanford and Eastern R. Corp.	11-15-61	20985	3- 2-61	
121.	Evangeline Ry. Co.	4- 1-62	No docket no.		
122.	Morrissey, Fernie and Michel Ry. Co.	3- 1-62	No docket no.		
123.	Sumpter Valley Ry. Co.	2- 6-62	21687	11-14-61	
124.	Texas Short Line Ry. Co.	4- 1-62	21590	7-18-61	
125.	Campbell's Creek R. Co.	7- 1-62	21877	3-13-62	
126.	Prattsburgh Ry. Corp.	8-15-62	21729	1- 5-62	
127.	Nelson & Albemarle Ry. Co.	1-15-63	22245	11-26-62	
128.	The Tuskegee R. Co.	3- 1-63	22258	1-21-63	
129.	Chicago North Shore and Milwaukee Ry.	1-21-63	20245	5-10-62	

RAILROADS ABANDONED — 1942-1967

Name	Date of Abandonment	Finance Docket No.	Date of ICC Order	Citation
130. The Winnipeg River Ry. Co. (Operated by Canadian Pacific)	1-28-63	No docket no.		
131. Grasse River R. Corp.	8- 1-63	22099	8- 3-62	
132. Arkansas & Ozarks Ry. Corp.	12- 6-63	21148	4- 7-61	
133. Bowdon Ry. Co.	6-15-64	22844	12-11-63	
134. Kelly's Creek R. Co.	3- 6-64	22595	12-23-63	
135. Donora Southern R. Co.	4- 1-64	22619	8-16-63	
136. The Lakeside and Marbleherd R. Co.	8- 1-64	23007	6-18-64	
137. Okmulgee Northern Ry. Co.	8- 1-64	22529	5-11-64	
138. Wadley Southern R. Co.	4-30-64	22944	3-17-64	320 I.C.C. 637
139. The Buffalo Creek & Gauley R. Co.	3-15-65	23264	12-23-64	
140. Manistee & Repton R. Co., Inc.	2-15-64	22128	9- 1-64	
141. Smoky Mountain R. (J. E. Temple Rec.)	3-15-65	22910	4- 7-64	
142. Birmingham & Southeastern R. Co.	4- 1-65	23348	1- 4-65	
143. Brimstone R. Co.	5- 1-65	23017	12-16-64	
144. The Denison Pacific Suburban Ry. Co.	5- 8-65	23337	3-30-65	
145. Craig Mountain Ry. Co.	8-15-65	23540	6-22-65	
146. East Carolina Ry. (ACL)	11-17-65	22125	10- 6-64	

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 520

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE TEXAS AND PACIFIC RAILWAY COMPANY, AND THE TEXAS AND PACIFIC MOTOR TRANSPORT COMPANY, *Appellants,*

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, AND THE PERMIAN BASIN RAILROAD COMPANY, *Appellees.*

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 520

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE TEXAS AND PACIFIC RAILWAY COMPANY, AND THE TEXAS AND PACIFIC MOTOR TRANSPORT COMPANY, *Appellants,*

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, AND THE PERMIAN BASIN RAILROAD COMPANY, *Appellees.*

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division

---

MOTION TO AFFIRM

Permian Basin Railroad Co., Intervenor-Appellee, pursuant to Rule 16(1)(c), revised Rules of the Supreme Court of the United States, moves that final judgment and decree of the District Court be affirmed on the grounds that the questions presented are so unsubstantial as not to need further argument.

This is a direct appeal from a final judgment entered May 17, 1968, and an amended order entered June 20, 1968, by a District Court of three judges specially constituted pursuant to 28 U.S.C., Section 17, approving the Commission's order and dissolving the temporary injunction entered November 6, 1967, and denying the application of the Atchison, Topeka and Santa Fe Railway Company, the Texas and Pacific Railway Company, and the Texas and Pacific Motor Transport Company to annul, enjoin and set aside the enforcement operation and execution of the order of the Interstate Commerce Commission dated March 21, 1967, and August 24, 1967, issued in I.C.C. Finance Docket No. 22475, *Permian Basin Railroad Co. Construction Between Odessa and Seagraves, Texas,* reported at 330 I.C.C. 256 (1967). The decision of the three-judge court was per curiam and as of now has not been reported, but is attached to Appendix 3 of Plaintiff-Appellants' brief.

In support of its motion to affirm, Appellee, Permian Basin Railroad Co., adopts as grounds for its motion those advanced in the motions filed, or to be filed by the United States of America and the Interstate Commerce Commission and in addition it urges the grounds hereinafter set forth.

QUESTIONS PRESENTED

The questions presented by the appeal, as set forth in the jurisdictional statement, are as follows:

1. Did the court below err in approving the Commission's unprecedented laissez faire doctrine, irrespective of the evidence that the proposed line will in all likelihood not be able to operate profitably?

2. Did the Commission fail to make its own determination of whether the proposed railroad should be constructed, and instead abandon that function to Permian Basin's incorporators?

3. Is there any substantial evidence to support the Commission's conclusion that Permian Basin's application should be granted?

4. Is the Commission's report so lacking in factual findings that the protestants have been deprived of their right to obtain meaningful judicial review of the Commission's decision?

However, the real question for the court is:

1. Does the appeal present a substantial question warranting this Court taking jurisdiction?

The collateral questions are:

1. Did the court below properly perform its primary function as a three-judge statutory court of determining whether there is substantial evidence on the record as a whole to support the findings of the Commission, and whether it (the Commission) has applied legal standards in the conduct of the proceedings before it in the conclusions which it (the Commission) reaches?[1] (See *Florida East Coast Railway Company* v. *United States*, 242 F. Supp. 490 (1965), affirmed per curiam, 382 U.S. 161; 86 S. Ct. 316; 15 L. Ed. 2d 228, November 22, 1965.)

[1] The application by the Commission of legal standards in the conduct of the proceedings before it have not been questioned by Appellants, and thus is not in question here.

2. Whether the court below found that the Commission's factual determination that the "present and future public convenience and necessity" requires the construction and operation by the Permian Basin Railroad Co. of a line of railroad in Ector, Andrews, and Gaines Counties, Texas, was based upon adequate findings supported by substantial evidence on the record as a whole.

STATEMENT

Permian Basin Railroad Co. (Permian Basin), a Texas corporation, filed application with the Interstate Commerce Commission for a Certificate of Public Convenience and Necessity under Section 1(18)-(20) of the Interstate Commerce Act, 49 U.S.C. Section 1(18)-(20) permitting it to construct and operate a line of railroad between Odessa and Seagraves, Texas, connecting with the Atchison, Topeka and Santa Fe Railway Company (Santa Fe) at Seagraves, Texas, and with the Texas and Pacific Railway Company (T&P) at Odessa, Texas, approximately 78 miles long.

The Permian Basin stated as reasons for its application:

(1) The large area to be traversed lacks direct rail service and thus increases costs and places shippers and receivers in a non-competitive position;

(2) Direct rail service is necessary to properly develop and use the area's natural resources, to provide jobs, housing, etc., for its share of our growing population;

(3) To permit the communities to make their contribution to vast scientific and technological advances being made;

(4) To assist in development of industry where natural resources are, which cannot be done without this railroad; and

(5) To preserve the area from possibly becoming a depressed area for lack of new industry and jobs. (Application, pp. 3-4)

The full administrative process was employed by the Interstate Commerce Commission, excluding oral argument, which was only requested by Applicant. This administrative process included:

(1) The application of Permian Basin;

(2) Protest by T&P only;

(3) Return to Questionnaire, as required by the Commission, requiring extensive information to justify the construction of the railroad;

(4) Thirty-five days of public hearings with 4,610 pages, 92 exhibits, 48 shipper-witnesses in support of the application, none against, plus 15 technical, professional and expert witnesses in support of the application;

(5) A 234-page brief by T&P, none by Santa Fe, and a 217-page brief by the Permian Basin;

(6) Trial Examiner's report;

(7) 239-page exceptions and brief by Permian Basin to Trial Examiner's report; 42-page reply of T&P to exceptions of applicant; none by Santa Fe;

(8) Report and Order of the Commission;

(9) 29-page petition of T&P for reconsideration of the Commission's report; none by Santa Fe;

(10) Order of the Commission denying reconsideration of the report and order dated August 24, 1967;

all of which consumed 4½ years from the filing of the application.

The Commission found that,

"The record shows a need for direct rail service in the Odessa-Seagraves corridor and that such service would foster further development of the tributary area."

and therefore found:

"That the present and future public convenience and necessity have been shown to require the construction and operation of the Permian Basin Railroad Co. of the line of railroad in Ector, Andrews and Gaines Counties, Texas, herein described. The application is granted."

The report of the Commission follows the usual form of such reports in compliance with the Administrative Procedure Act. The Commission in its report:

(1) Describes the Applicant, purpose of the application and statutory authority for applications;

(2) Describes other parties;

(3) Stated:

"The Applicant filed voluminous exceptions to statement of fact, conclusions and rulings in the examiner's report. We have reviewed the testimony and the numerous exhibits compiled in this extensive record and have fully considered the views of all parties."

(4) Set out organization of Applicant;

(5) Described the type of service proposed by Applicant;

(6) Described the area proposed to be served, lack of rail service, economy of the area, and highway system;

(7) Discussed the financial estimates of the line operations offered by Applicant and Protestants;

(8) Discussed arguments of Protestants relative to revenues to be derived by Permian Basin and their effect on existing carriers;

(9) Considered Protestants' estimate of first year of revenue operation and attached it as Appendix B;

(10) Discussed Trial Examiner's Report;

(11) Discussed iron ore traffic projected by Applicant and rejected same as too speculative;

(12) Discussed projected traffic and revenue on sugar beets, grain, metallic oilfield supplies, anhydrous ammonia, cotton, petroleum products (being only a part of the 40 commodities) as projected by Applicant and discounted by Protestants;

(13) Substantially modified Applicant's projection (Appendix A to Report) and Protestants' projections (Appendix B to Report) and made its own "reasonable" estimate as warranted by the evidence of record (this was found to be $600,000 or 2½ times smaller than projected by Applicant and 2½ times greater than projected by Protestants);

(14) Gave the basis of its estimates of revenue;

(15) Estimated the operating costs at $550,000;

(16) Estimated a profit of $50,000;

(17) Discussed its reasons for its findings and its final conclusions, including:

(a) unusualness of case;

(b) willingness of residents to assume risks;

(c) substantial reservoir of traffic;

(d) the size and prosperity of the area to be served;

(e) attraction of new industry, changing transportation patterns for various commodities;

(f) the attractive r ute of the proposed line;

(g) great advantages to shippers and receivers;

(h) the controlling precedent (*Construction of Line by Wenatchee Southern Ry. Co.,* 90 I.C.C. 237 (1924);

(i) the argument of Protestants for denial of application;

(j) belief that "the record shows a need for direct rail service in the Odessa-Seagraves corridor and that such service would foster further development of the tributary area."

(18) Made an ultimate finding:

"that the present and future public convenience and necessity have been shown to require the construction and operation by the Permian Basin Railroad Company of the line of railroad in Ector, Andrews and Gaines Counties, Texas herein described."

Though it became a reluctant party of record in opposition, the Santa Fe did not file a formal protest,

did not present any evidence or witnesses or interrogate any witnesses, filed no briefs with the Commission and did not present any oral argument to the court below.

The three-judge court had before it the full record before the I.C.C., including briefs. It received additional briefs and heard oral argument. Thereafter, it unanimously approved the order of the Commission.

ARGUMENT

I. LACK OF SUBSTANTIAL QUESTION

This Honorable Court should deny jurisdiction for lack of substantial question and should affirm the order below.

The three-judge court properly performed its statutory duty of review of the order of the I.C.C. With the full I.C.C. record of the hearing before it, and after receiving extensive briefs and hearing oral arguments, the court unanimously affirmed and approved the order of the Commission and dissolved the temporary injunction.

The court reviewed the Commission's findings regarding rail traffic, commodities to be transported, area and industries to be served, development potential, total revenue projections of $600,000, total operating costs projection of $550,000 and net revenue projection of $50,000. The court also reviewed the Commission's finding that there was a need for the proposed rail service and that protesting rail carriers would not be materially affected by a grant of the application. The court found that there was substantial evidence to support each of the Commission's findings.

The court spoke directly to Appellants' objections to the Commission's findings of profitability. The court

determined the Commission's findings of profitability were not vague as contended by Appellants, and that they were supported by subsidiary findings and had a rational basis in fact, of record.

After sustaining the Commission's findings of a net income from operations of the Permian Basin, the court held:

> "In addition, it should be noted that profitability is only one factor, albeit a major one, to be considered. The ultimate question is public convenience and necessity. The presence of a great need in the Permian Basin for the proposed railroad balanced against only a minimal threat of hardship to other carriers provides an adequate basis for the Commission's order, irrespective of profitability. *Construction of Line by Wenatchee Southern Ry. Co.,* 90 I.C.C. 237 (1924)."

This Court in *Universal Camera Corp.* v. *National L. R. Bd.,* 340 U.S. 474; 95 L. Ed. 2d 456, 469; 71 S. Ct. 456 (1951), stated:

> "Our power to review the correctness of application of the present standard [of what is substantial evidence] ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals [in a three-judge district court in I.C.C. reviews]. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

No such misapprehension or misapplication has been shown nor does it exist in this case.

The proposed railroad is to be 78 miles long through a vast mineral and newly developing agricultural area

not now served directly by rail. It will connect with two unrelated trunk line railroads operating thousands of miles of track. It will not parallel any other through rail service. This can hardly be said to constitute a substantial impediment or problem to the transportation system of the country.

The granting of the certificate of public convenience and necessity in this case is not in conflict with any act of Congress nor any policy of the Commission. This case does not involve the interpretation of a statute, nor a novel economic theory or the application of a novel economic theory. The construction of Permian Basin will not have a materially adverse effect upon connecting carriers that would prevent their continuing to serve the shipping public. The legality of the Commission's proceedings is not questioned. There can be no great impact upon the transportation system of the country from a granting of the certificate.

No substantial question has been raised warranting plenary review by this Honorable Court.

II. ARGUMENTS TO QUESTIONS PRESENTED BY APPELLANTS

The questions presented by Appellants are not substantial.

A

Appellants' Question I

The Commission's order did not embody an unprecedented doctrine in conflict with the Transportation Act of 1920. The Commission's order is valid, legally sufficient, and consistent with the Interstate Commerce Act, the legislative history and judicial interpretations of that law.

The Transportation Act of 1920 added Section 1(18, (20) to the Interstate Commerce Act, thereby giving to the Interstate Commerce Commission the responsibility to regulate the construction of railroads. In the case at bar, contrary to Appellants' assertions, the Commission has not proferred any new or unprecedented legal or economic theory conflicting with the Transportation Act of 1920. Since 1920 there has been a steady stream of applications for authority under Section 1(18) of the Interstate Commerce Act.[2]

In fact, the Interstate Commerce Commission has often granted certificates of public convenience and necessity under Section 1(18) because of requirements for economic development. The controlling precedent in this area was first expressed in 1924—some 44 years ago—in *Construction of Line by Wenatchee Southern Ry. Co., supra.*

This Honorable Court approved the Commission's expression of the principles in the *Wenatchee* case, *supra,* in *Chesapeake & O. R. Co.* v. *United States,* 283 U.S. 35; 51 S. Ct. 337; 75 L. Ed. 824 (1931). These principles are still valid and were properly applied by the Interstate Commerce Commission in the case at bar.

The Interstate Commerce Commission has long had the authority and has, when required by the public convenience and necessity, exercised its administrative discretion to approve railroads for the purposes of developing territories, industry, or cities, to foster agricultural production, to exploit timber and mineral re-

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[2] *Construction of Lines by American Niagara R.R.,* 82 I.C.C. 420; *Construction of Line by M. & S. V. R.R.,* 99 I.C.C. 606; *Construction by Ft. Worth & Denver South Plains Ry.,* 117 I.C.C. 233; *Levisa River R. Co. Construction,* 158 I.C.C. 210; *Northern Pac. Ry. Co. Construction, Mesa-Mattawa, Wash.,* 331 I.C.C. 71.

sources, and even to foster the development of sugar beets.[3]

The three-judge court below was apprised of the fact that the approach of the Interstate Commerce Commission in this case in determining whether the public convenience and necessity required construction of the Permian Basin Railroad Co. was not unprecedented and was not novel. In fact, the Interstate Commerce Commission approved a railroad construction application in a proceeding which is on all fours with the case at bar. In *Construction of Line by Chicago, R. I. & P. Ry. Co.*, 111 I.C.C. 137 and *Acquisition of Line by Chicago, R. I. & P. Ry. Co.*, 145 I.C.C. 489, a new rail line was authorized to traverse a rich new agricultural area through an extensive gas and oil field for the purpose of developing the areas involved and to afford the public necessary direct rail service in those areas. This is what the Permian Basin Railroad is to do and the I.C.C. and the three-judge court so found.

Appellants' argument concerning the legislative history of Section 1(18) is not pertinent. The constitu-

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[3] *Certificate to Union Pacific R.R.*, 65 I.C.C. 382 and *Construction of Lines by American Niagara R.R., supra; Construction and Operation of Los Angeles Junction Ry.*, 99 I.C.C. 287; *Construction of Line by St. L. B. & M. Ry.*, 90 I.C.C. 780; *Construction of Line by M. & S. V. R.R., supra; Construction by Atlantic & N. W. R.*, 145 I.C.C. 435; *Construction of Line by Nicholas, F. & G. R. Co.*, 145 I.C.C. 643; *Public Convenience Certificate to B. R. & P. Ry.*, 70 I.C.C. 1; *Public Convenience Certificate to Okla. & Ark. Ry.*, 70 I.C.C. 448; *Construction of Line by Quebec Extension Ry. Co.*, 99 I.C.C. 93; *Construction of Line by National Coal Ry. Co.*, 99 I.C.C. 569; *Construction of Line by Southern P. Co.*, 150 I.C.C. 516; *Construction by Texas-New Mexico Ry.*, 145 I.C.C. 211; *Levisa River R. Co. Construction, supra; Construction of Line by B. & I. Ry.*, 99 I.C.C. 711; *Public Convenience Certificate to A. T. & Ry. Co.*, 70 I.C.C. 198.

tionality and validity of Section 1(18) of the Interstate Commerce Act are not in question in the case at bar and have not been at issue in the lower court. The terms and language of Section 1(18) are not vague, ambiguous, nor unclear. Furthermore, the scope and application of the provisions of Section 1(18) are clearly delineated in the numerous statements of the Interstate Commerce Commission, the Federal courts and this Honorable Court. Appellants' primary thrust is to attempt to convince the Court that profitability is the entire key to the issuance of a certificate of public convenience and necessity. This is wrong. This argument is a factual, evidentiary argument contesting the weight ascribed to certain items of evidence, and as such is not within the purview of judicial review in the case at bar.

B

Appellants' Question II

Appellants' statement that the Interstate Commerce Commission did not discuss nor weigh the evidence as the Examiner did, but abandoned this function to Appellee flies in the face of reason. The Commission did not abrogate its statutory duty but, in fact, made its own decision on the merits of the application proceeding after fully considering and adequately discussing the voluminous evidence of record, analyses of conflicting evidence, and contradictory interpretations and positions. The Commission decided that the future and present public convenience and necessity required the proposed railroad—not the Appellees'.

The Commission's public report and order approving the proposed railroad specified what it ordered: issuance of a certificate to construct a railroad; stated its ultimate findings and conclusion: that public con-

venience and necessity required the proposed railroad; and set forth, at some length, its findings of fact which were the essential bases of its decision.

This Honorable Court is respectfully referred to the Statement portion of this Motion for a full recitation of the specific findings set forth in the comprehensive report and order issued by the Commission. It should be noted that not only did the Commission specifically comment upon the conflicting evidence of record, but specifically pointed out areas where its own conclusions drawn from the evidence were at variance with those of the parties. In other words, the Commission made a series of its own independent conclusions from the evidence of record, and set forth those conclusions and the underlying bases therefor in its report.

In short, the final report conclusively demonstrates that the Interstate Commerce Commission, in fact, fulfilled its statutory duty of determining the merits of the case and resolving the conflicting evidence presented in the proceeding. It is the Interstate Commerce Commission's function to draw such reasonable conclusions from its findings as in its discretion are appropriate, and this the Commission did in a proper, reasonable and rational manner.

C

Appellants' Question III

The Commission's decision is supported by substantial evidence. Appellants aver that because the Commission drew a conclusion contrary to one expressed by the Hearing Examiner, the opinion of the Commission was not supported by substantial evidence.

The Examiner's report was only a recommendation to the Commission—it was not administratively final,

nor a conclusive and binding finding—and no party has contended otherwise. It is the Commission's duty to review the record, including the Examiner's report, and derive its own conclusions therefrom. The Commission is not bound by an Examiner's recommendation, and it is not error to refuse to adopt such a recommendation. The Commission in this case did consider the Examiner's report and commented on it in the Commission's own report and order. *F.C.C.* v. *Allentown Broadcasting Corp.*, 349 U.S. 358; 75 S. Ct. 855; 99 L. Ed. 1147 (1955); *Universal Camera Corp.* v. *National L. R. Bd., supra; Davis, Administration Law,* Vol. II, Sec. 10.04 (1958).

The facts of the case at bar do not support Appellants' assertions. This case has been in active litigation for more than 5 years. During this time more than 4,600 pages of testimony (subject to cross-examination), almost 100 exhibits, hundreds of pages of briefs, reports, exceptions, and motions have been compiled in the record of this proceeding. The Commission has gone through the record, has received and commented upon conflicting evidence, and there is simply no doubt that the Commission had substantial evidence, on the record as a whole, to support its finding that the public convenience and necessity required the proposed railroad.

The test of judicial review of the validity of a decision of the Commission is whether the action of the Commission is supported by substantial evidence on the record as a whole. *Illinois Cent. R. Co.* v. *Norfolk & Western R. Co.*, 385 U.S. 57; 87 S. Ct. 225; 17 L. Ed. 2d 162 (1966). This Honorable Court has stated substantial evidence is "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclu-

sion sought to be drawn from it is one of fact for the jury." *Illinois Cent. R. Co.* v. *Norfolk & Western R. Co., supra; National Labor Rel. Bd.* v. *Columbian E. & S.*, 306 U.S. 292; 83 L. Ed. 660 (1939), and see *Consolo* v. *Federal Maritime Com.*, 383 U.S. 607, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966).

The three-judge court carefully evaluated whether or not the Commission had before it substantial evidence on the record as a whole for its decision. A case of this nature is necessarily technical and extensive in scope, and it must be remembered that the substantial evidence requirement is not intended to negate the function of an administrative tribunal such as the Commission. *General Motors Corporation* v. *United States*, 207 F. Supp. 641 (1962), (E.D. Mich. S.D.), aff'd. 324 F. 2d 604 (1963) U.S.C.A. 6th Cir. The proceedings before the Commission are not in the nature of private litigation; and, as a guardian of the public interest, the Commission must necessarily have an outlook as comprehensive as the interest of the entire country.

In summary, the three-judge court properly found that the vast record which the Commission had before it met the substantial evidence test.

D

Appellants' Question IV

The Commission made adequate findings of fact as required by law.

The Commission is required only to make a written report stating its conclusions together with its decision and order. Where the Commission sufficiently discloses the essential basis of its judgment in its report, the courts will not set that judgment aside. The law re-

quires the Commission to set forth only the ultimate facts upon which its conclusions lie. *Alabama Great S. R. Co.* v. *United States*, 340 U.S. 216, 227 95 L. Ed. 225, (1951); *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 66 S. Ct. 687, 90 L. Ed. 821 (1946).

The Commission is not required by law to make a complete discussion as to the testimony nor arguments advanced in a proceeding, nor is it required to specify the weight given to each item of evidence or fact. *Interstate Commerce Commission* v. *City of Jersey City*, 322 U.S. 503, 512; 64 S. Ct. 1129, 88 L. Ed. 1420 (1944); *Interstate Com. Com.* v. *Union P. R. Co.*, 222 U.S. 541, 56 L. Ed. 308, (1912); *Luckenbach S. S. Co.* v. *United States*, 122 F. Supp. 824 (1954), aff'd. 347 U.S. 984, 98 L. Ed. 1120 (1954).

Furthermore, the Commission is not required to disclose the mental operations by which its decisions are reached. *Baltimore & O. R. Co.* v. *United States*, 298 U.S. 349, 56 S. Ct. 797, 80 L. Ed. 1209 (1936). This Court recognized long ago that the Commission is not and should not be required to annotate each of its findings on applications for a certificate of public convenience and necessity or the evidence supporting it. *United States* v. *Pierce Auto Freight Lines, supra,* and *Baltimore & O. R. Co.* v. *United States, supra.*

In essence, as long as the essential basis for a rational conclusion is found, considering the report as a whole, the findings of the Commission do not even have to be sharp and clear. *Pennsylvania R. Co.* v. *U. S.*, 323 U.S. 588, 593, 65 S. Ct. 543, 89 L. Ed. 478 (1945).

The cases cited by Appellants are primarily rate and merger decisions. These matters come under different statutes and sections of the Interstate Commerce Act than applications for construction of a line of railroad. The legal requirements, burdens of proof, and statutory

policies for rate and merger proceedings are entirely different and separate from the concept, criteria and application of Section 1(18) of the Act.

The public interest involved in a merger case is a different concept than public convenience and necessity under Section 1(18). This Court has taken cognizance of the particular criteria applicable under Section 1(18) and the case at bar should not be argued on theories which are not pertinent to Section 1(18).

III. APPELLANTS' APPENDIX 4

The Appellants have attempted in the three-judge court and in this Court to substitute their judgment of profitability for that of the Commission. They have also attempted to convey the impression that all shortline railroads are unprofitable and being abandoned.

Appellants, in their Appendix 4, pages 107-115, list "railroads abandoned—1942-1967," both shortline and branch lines. They conveniently omitted the abandonment of the Georgetown, Texas branch of the Missouri Pacific (MOPAC), the parent company of the T&P. The I.C.C. authorized abandonment by MOPAC by a report of the Commission dated January 14, 1959, Finance Docket No. 19809. In its application for abandonment (recited in the Report of the Commission) the MOPAC showed carloads, railway operating revenues and railway operating costs for the years 1952 through 1957 as follows:

Year	Carloads	Revenue accruing Georgetown Branch	Operating costs Georgetown Branch
1952	716	$5,029	$47,308
1953	421	4,576	44,795
1954	258	2,068	33,675
1955	394	3,707	33,292
1956	281	2,358	23,723
1957	171	1,844	18,294

On the same day MOPAC was authorized to abandon the Georgetown Branch a new unaffiliated company was authorized to buy and operate the abandoned railroad. The following tabulation was prepared from the annual reports of the Railroad Statistical Section of the Railroad Commission of Texas for the years shown. The tabulation shows the railway operating revenues accrued to the Georgetown Railroad, the railway operating expenses and the ratio of railway operating expenses to railway operating revenues:

Year	Revenue	Expenses	Ratio
4½ mos. of 1959	$ 54,541	$ 48,375	86.69 percent
1960	152,953	67,293	44.00 percent
1961	242,448	93,050	38.38 percent
1962	334,445	200,762	60.03 percent
1963	355,070	196,975	55.47 percent
1964	254,398	156,217	61.41 percent
1965	271,541	165,683	61.02 percent
1966	377,192	185,778	49.25 percent

Abandonments occur for various reasons such as depletion of forests, mines, etc. In the Georgetown case it obviously came about because of poor management and lack of service to the shipping public.

This indicates the need of independent operations of some railroads.

T&P, the real Appellant in this case, disclosed its real objections in the testimony of Vice President J. J. Finnegan and Mr. B. J. Reynolds of the T&P staff. Mr. Finnegan said T&P objected to the Permian Basin serving Odessa and that T&P wanted to be the only railroad in Odessa. (Tr. 3202). Mr. Reynolds testified to the effect T&P would not cooperate with the Permian Basin in furnishing schedules and service to the shipping public (TR 4526-4543).

CONCLUSION

Appellants have not presented any question so substantial as to require plenary consideration by this Court. Therefore, the order of the three-judge court should be summarily affirmed.

Respectfully submitted,

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No. 520

In the Supreme Court of the United States

OCTOBER TERM, 1968

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 520

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. App. 104–106) dismissing appellants' suit to set aside a Report and Order of the Interstate Commerce Commission (J.S. App. 76–103) which authorized the Permian Basin Railroad Company (PBRR) to construct and operate a new railroad line in Texas.

On February 21, 1963, the PBRR applied for such

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authority under Section 1(18)–(20) of the Interstate Commerce Act, 49 U.S.C. 1(18)–(20). Upon protests by the appellants, a full hearing was held before an examiner, and he recommended denial of the application (J.S. App. 1–75). The PBRR filed exceptions, and the Commission, three members dissenting, rejected the hearing examiner's recommendation and granted the application. From its careful examination of the evidence in the record concerning estimated revenue from carriage of various commodities, the Commission concluded that in its first year of operation the PBRR would have net operating revenues of $600,000, and net income of $50,000 (J.S. App. 85–89). In any event, the new railroad would attract new industry, generate new traffic, and generally "foster further development of the tributary area" (J.S. App. 93). Shippers and receivers in the area would derive great advantages from the new line, and the protesting carriers would not suffer any material adverse effect (J.S. App. 90). The Commission concluded that construction of the new railroad was required by the present and future public convenience and necessity.

The court below affirmed, holding that the Commission's findings were supported by substantial evidence and that its estimates as to future profitability were sufficiently precise and specific. The court also held that, in any event, the Commission's order was justified by the great need for construction of the new line, "balanced against only a minimal threat of hardship" to appellants, irrespective of profitability (J.S. App. 105.)

ARGUMENT

This Court has repeatedly made clear that the Interstate Commerce Commission "possesses a 'wide range of discretionary authority' in determining whether the public interest warrants certification of any particular proposed service." *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83, 88; *United States* v. *Detroit & Cleveland Nav. Co.,* 326 U.S. 236, 241; *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60. In a growing economy service must be made available that is adequate to meet the needs of tomorrow as well as today. "Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems." *Board of Trade* v. *United States,* 314 U.S. 534, 546.

There is no basis for appellants' claim that the Commission applied an "unprecedented laissez faire doctrine" and "abdicated * * * its statutory duty" to protect the public and investors (J.S. 17–24). Rather, the Commission's conclusion is supported amply by its findings that a need exists for the proposed facilities, that they would be profitable, and that the appellants would not suffer any material adverse effects from their establishment. These findings were properly upheld by the district court as supported by substantial evidence considering the record as a whole (J.S. App. 104–105). There is no need for a further examination of the record by this Court. *Illinois C. R. Co.* v. *Norfolk & W. R. Co.,* 385 U.S. 57, 65–69; *Universal Camera Corp.* v. *N.L.R.B.,* 340 U.S. 474, 490–491.

Appellants' principal contention, that the Commission did not give sufficient consideration to the future profitability of the new railroad (J.S. 17), is without substance. The Commission carefully considered the sharply divergent revenue and cost estimates of the parties and then made its own determination that net income during the first year of operations would be some $50,000 (J.S. App. 86–89).[1] Recognizing that the Commission's estimate of profitability was necessarily a prediction of future events, the court below correctly held that it was sufficient (J.S. App. 105). "An intelligent estimate of probable future values * * *, and even indeed of present ones is at best an approximation. The like is true of a forecast of future revenues. There is left in every case a reasonable margin

[1] Appellants' assertion that at least "a $250,000 annual deficit will be incurred if Permian Basin is financed as its incorporators propose" (J.S. 17) is based on a prematurely assumed $300,000 annual debt service expense. This expense is purely speculative, since, as the Commission pointed out, the feasibility and fairness of PBRR's plans to finance the railroad remain to be considered in a subsequent proceeding under Section 20a of the Interstate Commerce Act (49 U.S.C. 20a) when PBRR applies for authorization to issue securities. At that time "the Commission might conclude that [PBRR] should be financed entirely by the sale of common stock or by stocks and contingent income bonds" (J.S. App. 93). Certainly it was not improper for the Commission to postpone until the financing proceeding the question of how much debt capital PBRR should be allowed. See *Federal Power Commission* v. *Tennessee Gas Co.*, 371 U.S. 145.

of fluctuation and uncertainty." *Dayton Power & Light Co.* v. *Public Utilities Commission,* 292 U.S. 290, 310. Appellants demand a predictive certainty which is simply unattainable. See *Erie-Lackawanna R.R. Co.* v. *United States,* 279 F. Supp. 316, 343 (S.D.N.Y.), affirmed *sub nom. Penn-Central Merger Cases,* 389 U.S. 486.

The Commission not only found that the PBRR would operate at a profit; it also weighed the possibility of losses. It found that even if the new railroad did suffer some initial losses, it would bring great advantages to its service area and would stimulate future economic growth and development (J.S. App. 89–92). In this context, the Commission properly concluded that "[w]ithin reasonable limits, residents of the area involved should be permitted to assume the risks" of constructing a railroad. *Construction of Line by Wenatchee Southern Ry. Co.,* 90 I.C.C. 237, 255–256; cf. *Penn-Central Merger Cases,* 389 U.S. 486, 510. Administrative discretion to evaluate the public convenience and necessity should not be fettered by a rigid requirement that immediate profits be guaranteed before new facilities can be provided to the public.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

ATCHISON, TOPEKA & SANTA FE R. CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

No. 520. Decided November 25, 1968.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.